Supreme Court, U.S.
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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

ROBERT L. VERNON,

Petitioner,

v.

CITY OF LOS ANGELES, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the Religion Clauses of the First Amendment violated by governmental action which mandates investigation of a public employee's religious beliefs and associations?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, defendants in the district court included City Council of the City of Los Angeles; Board of Police Commissioners of the City of Los Angeles; Zev Yaroslavsky, individually and as City of Los Angeles Councilman; Stanley Sheinbaum, individually and as City of Los Angeles Police Commissioner; Jesse Brewer, individually and as City of Los Angeles Police Commissioner; and Melanie Lomax, an individual. All parties except Jesse Brewer were defendants-appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 23, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 27 F.3d 1385 (9th Cir. 1994) and is appended hereto as Appendix A. The order

of the United States District Court for the Central District of California is unreported and is appended hereto as Appendix B.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on June 23, 1994. The jurisdiction of this Court is invoked under Title 28 of the United States Code §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

STATEMENT OF THE CASE

This action arises from the claim of petitioner, Robert L. Vernon, that respondent government officials improperly ordered an investigation of his religious views and associations and the impact of those views and associations on his job performance. The case was dismissed by the District Court for the Central District of California, in a judgment affirmed by the Ninth Circuit Court of Appeals, upon respondents' motion for summary judgment.

At the time this action was commenced, Mr. Vernon was an employee of respondent City of Los Angeles, having risen through the ranks of the Los Angeles Police Department ("LAPD") from patrolman to Assistant Chief of Police during his 38 years of service. As Assistant Chief since 1979, he was head of the Office of Operations of the approximately 8,400 member Department and commanded all patrol units and most detectives. (R 4, Complaint ¶ 5.)*

On May 5, 1991, an article appeared in the *Los Angeles Magazine* which commented critically on Vernon's religious beliefs and quoted from a series of audiotapes narrated by Vernon and produced by his church, Grace Community Church, fifteen years earlier.[1] Vernon claims the article greatly misrepresented his religious beliefs and portrayed them out of context. (R 8, Complaint ¶¶ 17-18.)

In response to this article, at a May 22, 1991 meeting of respondent Los Angeles City Council, the agenda of which involved confirmation of Michael Yamaki as a Los Angeles Police Commissioner, respondent City Council member Zev Yaroslavsky confronted Yamaki with the *Los Angeles Magazine* article and solicited his agreement that, if appointed Commissioner, Yamaki would inquire into

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*The signal "R" refers to the Excerpts of Record in the Court of Appeals. The signal "CR" hereafter refers to the Clerk's Record in the Court of Appeals.

[1] The article stated that Chief Vernon "condemns homosexuality, depicts cops as 'ministers of God', instructs churchgoers that 'the woman is to be submissive to the man' and adjures men to 'recognize the concept of disciplining followers, whether it be your son, employees or anyone under your control – your wife.' " (R 8, Complaint ¶ 17.)

Mr. Vernon's views and investigate whether they affected the operations of the LAPD. (R 8-9, Complaint ¶ 19; CR 4, pp. 3-4, Vernon decl.) Yaroslavsky stated, in reference to Vernon, "It's one thing to have an opinion, it's another thing to have an opinion when you're in charge of virtually every promotion." (R 120.) On May 25, respondent Police Commissioner Sheinbaum also joined in the call for an investigation, stating publicly that he "want[ed] to know if [Vernon] still holds these views and if there is any impact on the Police Department policies." (R 133; CR 95, p. 153, Sheinbaum dep.)

On June 3, 1991, respondent Yaroslavsky officially requested an investigation of Mr. Vernon in a letter sent to Board of Police Commissioners Acting President Melanie Lomax. The letter requested an investigation concerning whether Vernon's "personal religious . . . views" interfere with his "ability to perform official duties fairly and without bias"; "whether the views of Assistant Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department"; "[a]llegations concerning hiring and treatment of gays and lesbians"; and "consultation of religious elders on issues of public policy." (App. 84.)

Respondent Yaroslavsky, on the same day he sent his letter to the Police Commission, released it on official stationery to the media. (R 118-119; CR 48, p. 4, Yaroslavsky decl.)

On June 6, 1991, upon the unanimous vote of respondent Board of Police Commissioners, respondent Lomax sent an official Request for Investigation to Chief of Police Daryl Gates. Although the Police Commissioners

had no independent knowledge of misconduct by Mr. Vernon (CR 48, p. 152, Lomax decl.; R 123-132, Sheinbaum dep.), their Request adopted all the provisions of the Yaroslavsky request for investigation and expanded its scope to include inquiry into promotion, hiring and treatment of women; whether Vernon "has sent official communications from his office which contain or have displayed religious symbols"; and "whether employees who have been promoted by Chief Vernon have received preferential treatment through their affiliation with his church." (App. 86.)

Although respondents Lomax, Sheinbaum and Yaroslavsky all disclaimed any intent to abridge Vernon's First Amendment rights in ordering the investigation, all respondents were in agreement that its scope was to include an investigation not only of Mr. Vernon's consultation with church leaders, but an investigation into how Vernon's religious beliefs influenced his job performance. (*See e.g.*, CR 95, pp. 378, 381-382, Los Angeles Mayor Bradley dep.; CR 95, pp. 350, 359, City Council member Bernson dep.; CR 95, pp. 314, 317, 320, City Council member Picus dep.; CR 48, p. 144, City Council member Woo decl.; CR 48, p. 147, City Council member Braude decl.; CR 48, p. 91, Exh. H to Yaroslavsky decl.; R 130, statement of Police Commissioner Sheinbaum.) In the agenda for the October 4, 1991 closed session of the Board of Police Commissioners, the investigation is described as examining the on-duty activities of Chief Vernon "to determine if his religious beliefs" have impacted on his job performance as well as to find out if he had improperly imposed his "personal religious beliefs" upon the workplace. (CR 32, p. 5, Exh. 8 to Vernon decl.) Again the

subject of inquiry covered Vernon's religious associations. (*Id.*) Chief Gates, who was entrusted to carry out the investigation, at once categorized it as a "witch hunt", "specifically aimed at Bob Vernon's religious views, period". (CR 95, pp. 245, 247, Gates dep.)

Respondents' call for a religious investigation and the immediate release of this to the media caused Chief Vernon to suffer extreme embarrassment, anxiety and fear in pursuit of his religious, personal and professional affairs. He testified that the overhanging presence of a governmental investigation of his religious beliefs and associations retarded him in the exercise of his religious beliefs, including worshipping as he chose, consulting with his pastor, participating in Christian fellowship and giving public testimony to his faith. (CR 4, p. 8, Vernon decl.; CR 56, pp. 93-100 Vernon dep.) He suffered from sleep deprivation, anxiety, depression, colitis, fatigue and headaches for which he was forced to seek medical treatment. (CR 56, pp. 85-97, Vernon dep.)

Mr. Vernon became reluctant to attend fellowship groups or associate with LAPD employees who in any way identified themselves as "Christian," and he suffered anguish over going to church. (R 93, 108; CR 56, pp. 140-141, Vernon dep.) He encountered rejection, suspicion and lack of acceptance socially and professionally due to the government's portrayal of him as a "religious zealot" (R 101-102) and felt pressured to abandon or modify his beliefs.[2]

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[2] While having made the first cut for consideration as Chief of Police (in the event of Chief Gates' resignation) (R 109), he

Mr. Vernon testified that the exercise of his religion has "a price tag put on it . . . It's costing me my reputation. It's costing me probably the job of being police chief here and it will probably cost me other things . . . [C]ity government . . . is looking upon me as religiously incorrect and to be purged." (R 117.)

On November 4, 1991 – after five months of investigation during which time respondents refused to apprise Vernon of any specific charges against him and during which time the investigation was the subject of much local and national media attention[3] – Vernon filed a §1983 action against the City of Los Angeles, the City Council, the board of Police Commissioners, Yaroslavsky, Sheinbaum, Lomax and Jesse Brewer[4] claiming, *inter alia*, that

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had now been informed by Gates, following respondents' release of the mandate, that he would "probably never be chief here" or "anywhere else." (R 115.) Mr. Vernon believed himself "unemployable" in view of the publicity given the investigation (*id.*) and the protracted period of time during which he was known to be under investigation. He noted that, although he had served on the Peace Officer Standards and Training Commission for eleven and a half years, Governor Wilson had failed to reappoint him when, in November, 1991, he was up for reappointment. (R 97, 111-113.)

[3] At least 33 articles appeared in newspapers of general circulation including the *Washington Post*, *USA Today*, and other national publications. (R 16, Complaint ¶¶ 19, 41; CR 4, pp. 14-65, Exh. 3 to Vernon decl.) Respondent Sheinbaum appeared on the nationally televised talk show "Geraldo" to discuss the investigation. (R 91.)

[4] Brewer has since been dismissed as a party.

publicly ordering and conducting the investigation violated the religious liberties clauses of the United States and California Constitutions.

The investigation was terminated three weeks after the filing of this lawsuit. Chief Gates reported that an investigation of Vernon's on-duty conduct revealed no wrongdoing whatsoever. (CR 48, p. 178, Gates decl.)

On February 3, 1992, respondents filed a motion for summary judgment in which they defended the investigation by claiming respondents were not motivated by religious bias or stereotyping in calling for an investigation of religious beliefs and associations. Rather they claimed Yaroslavsky had received allegations of on-duty misconduct by Vernon. Filed with the Motion were affidavits alleging, *inter alia,* that Vernon favored church members in hiring and promotion, pressured officers to attend religious meetings, and attempted to thwart the progress of homosexuals and female officers.

Mr. Vernon affirmed that respondents have a right to investigate credible allegations of on-duty misconduct. However, Vernon, through affidavits and evidentiary objections, challenged the affidavits submitted by respondents as based on innuendo, hearsay, perception based upon rumor, unreliable speculation, aged information and matter otherwise inadequate to support the investigation.[5] At the hearing on respondents' motion for summary judgment, the District Court judge, Steven Wilson,

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[5] For example, the investigation of Chief Vernon's views towards homosexuals was based on a research paper authored by Vernon in *1973* and a statement (denied by Vernon) that Vernon is alleged to have made in *1980.* (CR 48, p. 63, Exh. D to

precluded the presentation of oral argument by Mr. Vernon's counsel opposing the motion, limiting him to answers to three questions from the bench and directing him to sit down after brief responses to each. (Reporter's Transcript, Feb. 24, 1992 hearing, p. 14). Hence, respondents' allegations of misconduct by Vernon, all of which Vernon denied and challenged as inadequate to justify the investigation, were never permitted to be tested on the witness stand.[6]

By order dated March 11, 1992, and through amended orders dated April 1, 1992 and April 8, 1992, the District Court granted respondents' motion for summary judgment in its entirety. The Second Amended Order held that respondent Yaroslavsky was protected by legislative immunity, that Vernon had suffered no constitutionally significant burden to his Free Exercise rights, that respondents' actions did not violate the Establishment Clause

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Yaroslavsky decl.; CR 48, p. 60, Exh. D to Yaroslavsky decl.) There were no allegations Vernon ever discriminated on the basis of sexual orientation or acted contrary to LAPD policy. Similarly, Yaroslavsky alleged some officers were invited to attend religious services at an LAPD building – though he made no assertion that Vernon was in any measure involved in issuing the invitations. Further, not a single affidavit was filed or allegation made that Vernon ever mistreated women in the LAPD. Vernon, point by point, countered evidence proffered by Yaroslavsky – not simply to deny its truthfulness but also to show to the court that material factual disputes existed as to whether Yaroslavsky had any reason to call for a broad-based investigation.

[6] As noted above, Chief Gates reported that the investigation uncovered no evidence of wrongdoing by Vernon. (CR 48, p. 178, Gates decl.)

under the test prescribed by *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that respondent City officials Sheinbaum and Lomax were entitled to qualified immunity.[7] App. 52-80.

Vernon appealed the district court decision to the United States Court of Appeals for the Ninth Circuit. On June 23, 1994, the Court of Appeals affirmed the judgment of the District Court. The court commented that "the district court correctly noted that '[o]wing to the highly unusual facts of this case, there appear to be no directly applicable cases – either state or federal – for the Court to rely upon . . . " App. 16. Applying the *Sherbert v. Verner*, 374 U.S. 398 (1963), balancing test to analyze the Free Exercise claims arising under the United States and California Constitutions, the court found that Vernon had failed to demonstrate a substantial burden interfering with a tenet or belief central to his religious doctrine. App. 19-24. The court followed the district court in relying on *Laird v. Tatum*, 408 U.S. 1 (1972), and *Presbyterian Church (USA) v. United States*, 870 F.2d 518 (9th Cir. 1989). Finding no evidence of concrete harm to Vernon or evidence that his religious activities were monitored, the court held that application of *Laird* was conclusive:

> Vernon complains that the existence of a government investigation has discouraged him from pursuing his personal religious beliefs and practices – in other words, mere subjective chilling effects with neither "a claim of specific present

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[7] The district court also dealt with matters which Vernon did not raise on appeal to the Ninth Circuit – the liability of Jesse Brewer (named as a defendant in the Complaint) and Vernon's procedural due process and equal protection claims.

> objective harm [n]or a threat of specific future harm." *Laird*, 408 U.S. at 14. Such chilling effects are simply not objectively discernible and are therefore not constitutionally cognizable under *Laird*.

App. 23.

The court further held that to the extent Vernon's religious practices of consultation and proselytism "were burdened at all, such burdens cannot be said to be 'substantial' ". App. 23. Finding no substantial burden, the court declined to proceed further with the *Sherbert* analysis. App. 24.

The Court of Appeals applied the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to analyze Vernon's Establishment Clause claims. First, the court found a valid secular purpose in the City's actions: to determine whether Vernon's religious views were affecting his job performance in such a way as to violate LAPD policies and regulations. App. 29. Second, the court held that "[n]otwithstanding the fact that one may infer possible city disapproval of Vernon's religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation." App. 32. Finally, the court noted that the government action ("investigation of the impact of religious beliefs on Vernon's on-duty job performance" (App. 35)) was closely connected to the religious mission of the institution affected (Vernon's church). However, it found no continuing or systematic investigation of religious beliefs, given the limited scope and duration of the investigation. App. 35-36. Finding also no evidence of political divisiveness, the court concluded that the city's

action resulted in no excessive government entanglement. App. 39.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision, That Government May Order Investigation Of A Citizen's Religious Beliefs, Associations And Communications With His Church, Is A Per Se Violation Of The Religion Clauses Of The First Amendment. It Is Especially Dangerous As A Precedent Affecting All Public Employees.

Never, prior to this case, has an American court ruled that government may single out a citizen and order that his religious beliefs, as well as his communications with the religious body of his affiliation, be subjected to investigation.[8] That the citizen is, as here, a public employee, makes the Court of Appeals' ruling a precedent of enormous danger in a society where multitudes of people are governmentally employed.

The dispositive fact of this case is that the mandate for investigation was *not* limited to allegations of on-duty misconduct by Assistant Chief Vernon but was *also* expressly directed at his religious beliefs and associations. That fact is plainly acknowledged by the Court of Appeals. It describes the mandate as an order *"to inquire into whether Vernon's religious beliefs* improperly affected

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[8] The Court of Appeals states as "correct" the district court's statement that "[o]wing to the highly unusual facts of this case, there appear to be no directly applicable cases – either state or federal – for the Court to rely upon . . . " App. 16.

the operations of the LAPD." App. 7 (emphasis supplied). The court at once thereafter noted the respondent Police Commissioner Sheinbaum's publicly asking *"whether Vernon still holds the religious views* attributed to him . . . " App. 8 (emphasis supplied). The June 3, 1991 Yaroslavsky request for investigation (App. 84), as well as the June 6, 1991 Police Commission mandate (App. 86), not only *conjoined* Vernon's religious views with his on-duty performance but indeed made the latter dependent upon, and subordinate to the former.[9] If on-duty conduct was all that was involved – for example, employment discrimination against homosexuals or use of religious symbols on communications – there was no basis for ordering the inquiries as to Vernon's religious views. Nor was ordering investigation of Vernon's consultations with his religious elders relevant to his on-duty conduct.

If respondents were concerned over allegations of misconduct in office by Chief Vernon, they had available the reasonable and religiously neutral alternative: "Conduct an investigation of incidents of alleged on-duty wrongdoing by Assistant Chief Vernon." An appropriate inquiry, if credible allegations of discrimination existed,

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[9] The call for investigation of Mr. Vernon's religious associations cannot be treated as mere surplusage. Let alone may it be ignored as the Court of Appeals ignored it. The mandate said what it said. The respondents, its proponents, represented themselves to the court as skilled and seasoned civil libertarians. (CR 48, p. 2, Yaroslavsky decl.; CR 48, p. 148, Lomax decl.; CR 48, p. 164-165, Sheinbaum decl.) Theirs was not a failure to have drafted with narrow specificity; they candidly took broad and direct aim at Chief Vernon's religion.

would have been, for example: "Has Assistant Chief Vernon discriminated against homosexual officers?" *not* "How have Assistant Chief Vernon's religious beliefs affected his treatment of homosexual officers?" Vernon testified repeatedly that investigation of any and all aspects of his job performance was not only proper but a matter of duty by City officials if they had evidence pointing to the need therefor.

The Court of Appeals justified its ignoring of that point by turning to a matter utterly irrelevant – namely, that respondent Yaroslavsky has "allegedly uncovered evidence which suggested that" Vernon was guilty of a variety of religiously related breaches of duties of office. App. 8.[10] Regardless of how grave or credible the allegations were, nothing could justify respondents' lurching into Chief Vernon's religious beliefs and associations as subject matter for governmental investigation.

The mandate was not made less reprehensible by the fact that the investigation of Vernon's religion never took place. That failed to occur, not because it was not

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[10] Vernon had categorically denied each and every allegation presented to justify respondents' call for an investigation, but was denied a trial in which he could examine the handful of individuals who had made them. Evidence he presented by affidavits showed most of the allegations to be incredible, *e.g.*, the charge that Mr. Vernon had placed the religious mark of an "ixthus", or fish, on office communications, this in fact being secretarial "x" marks to indicate that Mr. Vernon's handwritten notes had been typed. (CR 59, p. 44, Ayala decl.) The respondent Yaroslavsky cited Vernon's use of the initial "p" as a religious symbol. (See sample at CR 48, p. 87, Exh. F to Yaroslavsky decl.) It was in fact simply the initial of Officer Parks, a witness for respondents. (CR 59, p. 45, ¶5, Ayala decl.).

ordered, but because Chief Gates, to whom the mandate was directed, recognized it for what it was, a call for a "witch hunt", "aimed at Vernon's religious views" and "absolutely shameful." (CR 95, pp. 243, 244, 247, Gates dep.). Gates thereafter limited his investigation to the secular matter of Vernon's on-duty performance and found baseless respondents' allegations of breaches of duty therein. (CR 48, p. 178, Gates decl.)

But this complete exoneration came five months after respondents had told the world that they had ordered an investigation of Vernon's religious beliefs and associations. Respondents' deliberate and immediate publicizing of the fact that Vernon's religious views and associations were to be the subject of formal governmental investigation not only rendered those suspect but created a public image of the holder of those views as a religious zealot not to be trusted with high responsibility as a police officer. The record shows that, in the five month period following June 3, 1991, Vernon's career, due to respondents' action, was destroyed. Above all, government testing of his religious beliefs and practices was simply not permitted by the Religion Clauses of the First Amendment.

A. Respondents' Actions Constitute A Per Se Violation of the Establishment Clause

The Court of Appeals has misapplied the test for Establishment Clause violations given in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court found a "valid secular purpose" in respondents' attempt "to determine whether

there was any basis to the allegations that Vernon's religious views were affecting his job performance in such a way as to violate either LAPD policies and regulations or the civil and constitutional rights of both police officers and citizens" or whether his actions violated the Establishment Clause. App. 29. The court dangerously erred in thus holding that government has any secular purpose in calling out a citizen for *investigation of his religious beliefs and religious associations* on the pretext that he is violating the law. The court deliberately relieved government of the burden of using *secular, less restrictive, readily available means* for accomplishing its goal.

The court erred equally in its analysis of the second prong of the *Lemon* test. Here the court said, "We do not believe" that the investigation of Vernon sent such a message of disapproval of religion. App. 31-32. The court at once acknowledged that its conclusion was shaky. It said that, at least as to Mr. Vernon's own religion, "The record is not quite that clear". App. 32. Further, "[t]he fact that the city expressly included within the scope of the investigation inquiries concerning 'consultation with religious elders on issues of public policy' *suggests that the city disapproved of such consulation, possibly due to the particular religious beliefs underlying such consultation.*" App. 32 (emphasis supplied).

The court's *Lemon* analysis is a collection of patent errors. The primary effect of the call to investigate Mr. Vernon's religious beliefs and associations was to inhibit religion – not only Vernon's religion but, by necessary implication, the religion of all public employees. The record details the distressing effects which his being religiously blacklisted had on Mr. Vernon's professional and

personal life. Respondents' actions defy the admonition that "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " (citation omitted) *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 594 (1989). It cannot be doubted that, were the mandate to have appeared in the form of the following statutory provision, this Court would strike it down:

> All employees of the State of California shall be examined in order to determine (a) whether their personal religious beliefs adversely impact on the performance of their duties in office, (b) whether they consult with their ministers, priests or rabbis on matters of public policy.

A clearer example of a *per se* violation of the Establishment Clause cannot be imagined. The First Amendment requires government neutrality toward religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217, 2226 (1993). The call to investigate a citizen's religion and religious associations violates the neutrality requirement.

B. Respondents' Actions Constitute A Violation of the Free Exercise Clause

The Court of Appeals simply ignored the record of the grievous harm experienced by Mr. Vernon due to the combined facts of singling him out for investigation of his religion and publicizing that to the world while, for five months, he remained under the cloud of the mandate and

without the exoneration which came to him eventually and too late to salvage his career.

The Court of Appeals would have done better to have given consideration to the precedent effect of its sanctioning of a call for religious inquisition. The necessary public image of Mr. Vernon which respondents created by singling him out for *religious* investigation was that both his religion and his profession of it were suspect, if not sinister. "Why", the public would logically ask, "if that were not so, would the magisterium of the City be provoked to have his beliefs and practices examined?" The respondents' deliberate pinpointing of Mr. Vernon's religious views and associations well illustrates the evil of *governmental identification* of citizens according to their religion. The orders of the Nazi authorities to require Jews to identify themselves by wearing a yellow badge had at once the effect of rendering them conspicuous on account of their religion and of therefore alienating them from the general community. See 1 ENCYCLOPEDIA OF THE HOLOCAUST (Israel Gutman, Ed., "Badge, Jewish") 138. This comparison is important in comprehending the significance of the unique governmental action involved in the present case.[11] As with the

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[11] A particular danger presented by the Ninth Circuit's decision is its sanctioning of religious stereotyping. The respondents continuously portrayed Mr. Vernon as a "fundamentalist" (*see e.g.* respondents' Court of Appeals Br. p. 18) whereas Vernon described himself as simply a "garden variety Christian." (CR 56, p. 235, Vernon dep.) Respondents hence *presumed* that Vernon would conduct himself as a fundamentalist religious fanatic. The respondents' emphasizing of baseless charges such as the "ixthus" story, their references to Vernon as a "Bible-

mere "three pence tax" which Madison decried in his Memorial and Remonstrance, the evil of the *principle* should be the focus of the incident it involves. J. Madison, *A Memorial and Remonstrance Against Religious Assessments*, in D. Davis, ORIGINAL INTENT, pp. 171-181. The action of respondents in targeting Vernon's religious views fell plainly within the class of "indirect 'discouragements' [which] undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *American Communications Association v. Douds*, 339 U.S. 382, 402 (1949). The Ninth Circuit has upheld the placing of a religiously identifying arm-band on Chief Vernon.[12]

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thumper" (CR 48, p. 94, Levant decl.), their unsupported supposition that he discriminated against women and, above all, their prurient demand for public exposition of his beliefs, can only be explained as examples of the same stereotyping unhappily well known to Jews, African-Americans, Orientals, Catholics and others.

[12] The Court of Appeals erred in holding Vernon suffered no constitutionally significant burden under the standing case, *Laird v. Tatum*, 408 U.S. 1 (1972). Not only does the singling out of Vernon for investigation confer standing on him under *Laird*, but *Laird* in no measure requires litigants to show they have actually abandoned the practice of their faith in order to state constitutional injury. Constitutional injury results *de facto* from government inquiry into a citizen's religious views and associations just as it does from government inquiry into a citizen's political views and associations. *NAACP v. Alabama*, 357 U.S. 449 (1958).

As this Court fittingly said in *Rutan v. Republican Party of Illinois*, 497 U.S. 67, 76 (1990): "The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges that this petition be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT L. VERNON, *Plaintiff-Appellant,* v. CITY OF LOS ANGELES; LOS ANGELES CITY COUNCIL; BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES; ZEV YAROSLAVSKY, individually and as Los Angeles City Councilman; STANLEY SHEINBAUM, individually and as Commissioner Board of Police Commissioners; JESSE BREWER, et al., *Defendants-Appellees.*	No. 92055473 D.C. No. CV-91-5994-SVW OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
October 6, 1993 – Pasadena, California

Filed June 23, 1994

Before: Betty B. Fletcher and Dorothy W. Nelson,
Circuit Judges, and Hubert L. Will.*

Opinion by Judge Will

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*Honorable Hubert L. Will, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

SUMMARY

Individual Rights/Religious Freedom/Civil Rights

The court of appeals affirmed a district court judgment. The court held that a civil rights plaintiff's state and federal constitutional rights were not violated by an investigation of whether his religious views were having an impermissible effect on his on-duty police department performance.

Appellant Robert Vernon worked as the Assistant Chief of Police of the Los Angeles Police Department (LAPD). Appellee Zev Yaroslavsky, a member of appellee Los Angeles City Council, sent a letter to appellee the Board of Police Commissioners of the City of Los Angeles requesting that an investigation be conducted to determine whether Vernon 1) had given unfair advantages in hiring and promotion decisions to fellow members of his church; 2) was influenced by his religious views in ordering no arrests at anti-abortion demonstrations; 3) pressured LAPD officers to attend religious meetings at the church; and 4) had used religious symbols in official LAPD correspondence.

On a motion by appellee Stanley Sheinbaum, a Police Commissioner of appellee City of Los Angeles, the Board voted to request that the Chief of Police initiate the investigation. After an investigation, the Chief reported to the Board that none of the allegations concerning Vernon's on-duty conduct could be substantiated.

Vernon brought a civil rights action against the City of Los Angeles, the City Council, the Board, Yaroslavsky, Sheinbaum and others, alleging that the pre-investigation activities and the investigation itself violated his federal constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process and Equal Protection Clause of the Fourteenth Amendment. He also alleged similar violations of his religious rights under the California Constitution. Vernon alleged that the defendants' actions retarded him in the exercise of his religious beliefs, including worship, consultation with his pastor, participation in Christian fellowship, and giving public testimony to his faith without severe consequences.

The district court granted the defendants' motion for summary judgment. Vernon appealed.

[1] California case law suggests that analysis of a claim of the constitutional right to the free exercise of religion is generally similar under both federal and state constitutional law. In fact, the California Supreme Court adopted a federal test enunciated by the Supreme Court, [2] under which a plaintiff must first establish that the government placed a substantial burden on his or her free exercise of religion.

[3] In this case, Vernon failed to demonstrate that the government's action substantially burdened his right freely to exercise his religion. [4] Vernon failed to offer any evidence to prove that the government's action interfered with his freedom to worship in the way he wanted, or to demonstrate that concrete harm resulted from the investigation. There was no evidence that the City ever

monitored Vernon's private religious activities. [5] The investigation was restricted in its scope to consideration only of Vernon's on-duty activities, and it resulted in no disciplinary action being taken against him. [6] Vernon complained of mere "subjective chilling effect"; he did not claim any specific present objective harm or any threat of specific future harm. Such chilling effects were simply not objectively discernable, and therefore were not constitutionally cognizable.

[7] Governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose. [8] In this case, the valid secular purpose of the City's investigation was reflected in documents which indicated that the purpose of the investigation was to determine whether LAPD policies were being violated.

[9] In addition, the investigation of Vernon did not send primarily a message of either endorsement or disapproval of religion. [10] While one could infer possible City disapproval of Vernon's religious beliefs from the direction of the investigation, this could not objectively be construed as the primary focus or effect of the investigation; the primary purpose of the government action was the investigation of any possible impermissible or illegal on-duty conduct of Vernon.

[11] Finally, the government actions in this case did not constitute administrative entanglement with religion. There was no continuing or systematic investigation of religious beliefs; in fact, several precautions were taken by the defendants to limit the scope and duration of the investigation.

[12] Thus, the government's action in this case did not violate the Establishment Clause.

[13] Although the California Constitution's "No Preference Clause" requires consideration of whether the government action exhibited a preference for a religion or religious belief, Vernon did not allege any such preference. Vernon contended only that the government action unconstitutionally discriminated against or disfavored his religion. Thus, the government's action in this case did not violate the establishment provision or the more expansive No Preference Clause of the California Constitution. [14] Accordingly, there was no violation of Vernon's state or federal constitutional rights.

[15] Because neither the action brought by Vernon nor his appeal could be characterized as frivolous, unreasonable, or without foundation, the defendants' request for attorneys' fees was denied.

COUNSEL

William Bently Ball, Elizabeth B. Place, Ball, Skelly, Murren & Cornell, Harrisburg, Pennsylvania; David L. Casterline, Casterline & Agajanian, Los Angeles, California, for the plaintiff-appellant.

Louis R. Miller, Christensen, White, Miller, Fink & Jacobs, Los Angeles, California, for the defendants-appellees.

OPINION

WILL, Senior Circuit Judge:

Plaintiff Robert L. Vernon, retired Assistant Chief of the Los Angeles Police Department, appeals from the

district court's grant of summary judgment in favor of the City of Los Angeles, the Los Angeles City Council, and the Board of Police Commissioners and its finding that the individual defendants were entitled to immunity as to their actions. Vernon brought an action under 42 U.S.C. § 1983, alleging that certain City of Los Angeles officials violated his United States First and Fourteenth Amendment and California state constitutional rights in connection with their investigation of whether his religious views were having an impermissible effect on his on-duty police department performance.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1367(a). We have jurisdiction over this timely appeal from the final decision of the district court pursuant to 28 U.S.C. § 1291. We affirm the grant of summary judgment in favor of the defendants on the plaintiff's state constitutional claims and Free Exercise Clause and Establishment Clause claims. Because we conclude that Vernon's state and federal constitutional rights were not violated, we do not address the district court's findings that the individual defendants were entitled to legislative and qualified immunity. We deny the defendants' request for attorneys' fees under 42 U.S.C. § 1988.

I.

FACTUAL BACKGROUND

Plaintiff Robert L. Vernon was the Assistant Chief of Police of the Los Angeles Police Department (the "LAPD") at the time of the commencement of this action. As the Director of the LAPD Office of Operations, he had

charge of eighty-five percent of operations for the approximately 8,400-member LAPD police force. He commanded all patrol units and most detectives. In 1980, he was appointed by the California governor as a Commissioner of the Peace Officer Standards and Training Commission. Since 1984, he has served as an elder of the Grace Community Church (the "Church"), in Sun Valley, California.

On May 5, 1991, an article appearing in the Los Angeles Magazine critically commented on Vernon's involvement in the Church. Specifically, the article quoted from a series of audiotapes made by Vernon for the Church approximately fifteen years earlier. According to the article, Vernon "condemns homosexuality, depicts cops as 'ministers of God,' instructs churchgoers that 'the woman is to be submissive to the man' and adjures men to 'recognize the concept of disciplining followers, whether it be your son, employees or anyone under your control – your wife.' " *The Dan Quayle Principle Strikes Again*, Los Angeles Magazine, May 21, 1991, at 28, Pl.'s Decl. Supp. Mot. Prelim. Inj., Ex. 1. Vernon claims that the article greatly misrepresented his sincerely-held religious beliefs.

Defendant Zev Yaroslavsky is one of several City Councilmen having oversight responsibility for the LAPD. On May 22, 1991, at a City Council meeting to confirm Michael Yamaki as a Police Commissioner, Yaroslavsky confronted Yamaki with the Los Angeles Magazine article and solicited his agreement, upon his confirmation, to inquire into whether Vernon's religious beliefs improperly affected the operations of the LAPD.

Defendant Stanley Sheinbaum is a Police Commissioner of the City of Los Angeles. On May 25, 1991, Sheinbaum questioned publicly whether Vernon still held the religious views attributed to him and if so, whether they were having an impermissible effect on his on-duty performance in the LAPD.

Yaroslavsky had allegedly uncovered evidence which suggested that: (1) Vernon had justified a secret, unauthorized investigation into Chief of Police Daryl Gates' off-duty activities by proclaiming that "God wants me to be chief"; (2) Vernon gave unfair advantages in hiring and promotion decisions to fellow Church members within the LAPD by manipulating LAPD test scores; (3) Vernon was known throughout the LAPD as a "bible thumper" and as head of the LAPD "God squad"; (4) Vernon was influenced by his religious views in ordering no arrests at antiabortion demonstrations, and in attempting to thwart the progress of homosexual and female officers within the LAPD; (5) Vernon had pressured LAPD officers to attend religious meetings at the Church and at LAPD headquarters; and (6) Vernon had used religious symbols, such as fish, in official LAPD correspondence. Based on this evidence, on June 3, 1991, Yaroslavsky sent a letter to defendant Melanie Lomax, acting President of the Board of Police Commissioners (the "Board"), requesting that an investigation be conducted to determine whether any of the alleged improprieties had in fact occurred.

In pertinent part, the letter stated:

> As you are aware, questions have arisen recently about whether the views of Assistant

> Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department. During his confirmation hearing, Commissioner Yamaki indicated a willingness to conduct an investigation of this matter. I am writing today to confirm my interest in such a review.
>
> Chief Vernon is, of course, entitled to his personal religious and political views. I vigorously defend his right to his views. However, when one's views interfere with one's ability to perform official duties fairly and without bias, it is no longer a personal matter, but a matter of public policy.
>
> Allegations concerning promotion, hiring and treatment of gays and lesbians, and, most recently, the consultation of religious elders on issues of public policy, deserve to be reviewed. If the allegations have merit, then they should be addressed and the problems corrected. If they are without merit, then they should be laid to rest at once. It is critical that this issue be dealt with thoroughly and expeditiously.

Letter from Yaroslavsky to Lomax of 6/3/91, Decls., Ex. C at 45. Yaroslavsky released the letter to the press on the same day. Vernon immediately reacted to the publicity by stating on KNBC-TV that "[i]nvestigating me because of my beliefs is against the law. It's against my rights as an individual." Br. of Appellant at 10.

On June 4, 1991, on Sheinbaum's motion, the Board voted unanimously to request that Chief of Police Daryl Gates initiate an investigation into these allegations.

Later that day, Sheinbaum and Lomax made public statements concerning the investigation. For example, Sheinbaum stated that "the views of the assistant Chief are his own. He has every right to them. What bothers me . . . is that some allegations do claim it has impacted on his role as Assistant Police Chief. That's going to be up to Chief Gates to determine." Excerpt of Regular Board Mtg. on 6/4/91, Sheinbaum Decl., Ex. C at 9. On June 5, 1991, Lomax sent an official request to Chief Gates on behalf of the Board, which called for an investigation.

In pertinent part, the memorandum stated:

> The Board of Police Commissioners requests that an investigation be conducted into certain issues raised by Councilman Yaroslavsky concerning the on-duty activities of Assistant Chief Robert L. Vernon.
>
> The investigation should include a determination in the areas of the promotions, hiring and treatment of gays, lesbians and women, and the consultation of religious elders on matters of police policy.
>
> It is respectfully requested that findings be made as to whether Chief Vernon has sent official communications from this office which contain or have displayed religious symbols. It is also specifically requested that a determination be made as to whether employees who have been promoted by Chief Vernon have received preferential treatment through their affiliations with his church. This determination is to include both sworn and civil personnel.
>
> It should be clear from the outset that it is not the intention of this Board to abridge the

> First Amendment rights of Chief Vernon or anyone else, as each member of this Commission would vigorously protect and defend those rights. The Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures. It is toward this end that a thorough investigation is requested.
>
> It is requested that a progress report be presented in Closed Session on June 25, 1991, and that a final report be completed as early in July, 1991, as possible.

Memorandum from Lomax to Chief of Police of 6/5/91, Lomax Decl., Ex. C. The request was sent to Gates pursuant to a Board policy requiring that complaints from the general public or elsewhere alleging police misconduct be referred to the Chief of Police for investigation.

Shortly following his receipt of Lomax's memorandum, Chief Gates began the investigation of Vernon in accordance with the policies established by the Board and the LAPD. According to Chief Gates, the investigation focused entirely on Vernon's on-duty conduct. Apparently, no specific inquiry was made into Vernon's religious beliefs. In the five months during which the investigation took place, the contents of the request for investigation were disclosed to neither Vernon nor the public. On November 26, 1991, Chief Gates formally reported to the Board that none of the allegations concerning Vernon's on-duty conduct could be substantiated. Accordingly, the investigation was terminated and that the Board took no further action with respect to the allegations concerning the plaintiff.

II.

PROCEDURAL BACKGROUND

Plaintiff filed a § 1983 action against the City of Los Angeles, the City Council, the Board, Yaroslavsky, Sheinbaum, Brewer, and Lomax on November 4, 1991. In his complaint, Vernon alleged that the pre-investigation activities and the investigation itself violated his federal constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He also alleged similar violations of his religious rights under Article 1 of the California Constitution.

Between May 5, 1991 and the time the complaint was filed, approximately 33 articles concerning the investigation of Vernon appeared in newspapers and journals. Vernon contends that the defendants' actions have caused him to suffer extreme embarrassment, anxiety, and fear in the pursuit of his religious, personal, and professional affairs. He further claims that their actions have retarded him in the exercise of his religious beliefs, including worship, consultation with his pastor, participation in Christian fellowship, and giving public testimony to his faith without severe consequences. He also alleges damage to his personal and professional reputation. For example, he was not re-appointed to the Peace Officer Standards and Training Commission, on which he had previously served for many years.

On December 17, 1991, the district court denied Vernon's motion for a preliminary injunction. On April 8,

1992, the district court issued its Second Amended Order, which granted the defendants' motion for summary judgment in its entirety. In its opinion, the district court dismissed the action against Yaroslavsky on the grounds of absolute legislative immunity and as to Brewer on the grounds that his alleged conduct did not rise to the level of a constitutional violation. With respect to the free exercise claims, the district court dismissed the action as to all defendants, finding that Vernon failed either to allege or to prove a constitutionally cognizable injury. With respect to the establishment claims, the court similarly dismissed the action, finding no triable issue of material fact and concluding that the investigation and related activity passed the *Lemon* test and that the City's actions were justified by the City's compelling state interest and were properly narrowly tailored to serve the interest. The court also dismissed the Equal Protection and Due Process Clause claims. Concluding that the analysis of the plaintiff's claim under Article I, Section 4 of the California Constitution would not differ from that of the Free Exercise Clause and Establishment Clause claims under the federal constitution, the district court found it unnecessary to address separately Vernon's state constitutional rights.

On appeal, Vernon challenges the district court's rulings regarding his state constitutional claims, his Free Exercise Clause claim, his Establishment Clause claim, absolute legislative immunity, and qualified immunity.

III.

DISCUSSION

A. *Standard of Review*

This Court reviews *de novo* a grant of summary judgment, and may affirm on any ground supported by the record. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1112 (9th Cir. 1989), *cert. denied*, 496 U.S. 943 (1990). Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). *See also Valladolid v. City of National City*, 976 F.2d 1293, 1295 (9th Cir. 1992); *Grimes v. City and County of San Francisco*, 951 F.2d 236, 239 (9th Cir. 1991).

A district court's interpretation of state constitutional law is reviewed *de novo* by this court. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 969 (1992). At this court has previously noted, a federal court interpreting state law is bound by the decisions of the highest state court. *Id.*; *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990) (citing *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *reh'g denied, op. modified*, 810 F.2d 1517 (9th Cir. 1987)). Moreover, federal courts are not precluded from affording relief simply because neither the state supreme court nor the state

legislature has enunciated a clear rule governing a particular type of controversy or claim. *Hewitt*, 940 F.2d at 1565; *Paul v. Watchtower Bible and Tract Soc'y of New York*, 819 F.2d 875, 879 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987). Where the state supreme court has not spoken on an issue presented to a federal court, the federal court must determine what result the state supreme court would reach based on state appellate court opinions, statutes, and treatises. *Hewitt*, 940 F.2d at 1565; *Kirkland*, 915 F.2d at 1239; *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir.), *cert. denied*, 473 U.S. 934 (1985).

Accordingly, we must determine, viewing the evidence in the light most favorable to Vernon, (1) whether there exist any genuine issues of material fact and (2) whether the district court properly applied the relevant substantive law to Vernon's claims. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 584 (9th Cir. 1993).

B. *Vernon's Claims Under the California Constitution*

It is well-established that we should avoid adjudication of federal constitutional claims when alternative state grounds are available. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991) (citing *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909)), *cert. denied*, ___ U.S. ___, 112 S. Ct. 969 (1992); *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985). Where the state constitutional provisions are co-extensive with related federal constitutional provisions, we may decide the federal constitutional claims because that analysis will also decide the state constitutional claims. *Los Angeles County Bar*

Ass'n v. Eu, 979 F.2d 697, 705 n. 4 (9th Cir. 1992). However, where the state provisions offer more expansive protection than the federal constitution, we must address the state constitutional claims in order to avoid unnecessary consideration of the federal constitutional claims. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1524 (9th Cir. 1993), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. April 26, 1994) (No. 93-1692); *Hewitt*, 940 F.2d at 1565.

The district court correctly noted that "[o]wing to the highly unusual facts of this case, there appear to be no directly applicable cases – either state of federal – for the Court to rely upon. . . . " Second Am. Order Granting Def.'s Mot. for Summ. J. at 2 n. 1. Therefore, in considering both the state and federal claims raised by the plaintiff, the district court applied "general principles common to both federal and California constitutional doctrine" relating to the Free Exercise and Establishment Clauses. *Id.* As noted above, the district court concluded that the plaintiff's state constitutional rights in this case were essentially co-extensive with his federal rights and thus did not require separate consideration. While we ultimately agree with the district court that the outcome in this case is the same under both state and federal constitutional law, state law sometimes requires a different analysis and we will address these differences in our ensuing discussion of Vernon's state and federal claims.

C. *Free Exercise of Religion*

[1] Article I, Section 4 of the California Constitution provides in pertinent part that "[f]ree exercise and enjoyment of religion . . . are guaranteed. This liberty of

conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Cal. Const. Art. I, § 4. The First Amendment of the United States Constitution protects the "free exercise" of religion. U.S. Const. Amend. I. California case law suggests that analysis of a claim of the constitutional right to the free exercise of religion is generally similar under both federal and state constitutional law. *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 56-57 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989). In fact, the California Supreme Court has specifically adopted the federal test enunciated by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). *People v. Woody*, 394 P.2d 813, 815-16 (Cal. 1964). *See also Walker v. Superior Court*, 763 P.2d 852, 869-71 (Cal. 1988) (applying federal balancing test and compelling state interest analysis as a matter of state constitutional law), *cert. denied*, 491 U.S. 905 (1989); *Molko*, 762 P.2d at 57 (same); *In re Arias*, 725 P.2d 664, 679 (Cal. 1986) (same).

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court articulated the balancing test that has traditionally been utilized to analyze claims brought under the Free Exercise Clause. Under this test, government actions that substantially burden a religious practice must be justified by a compelling state interest and must be narrowly tailored to achieve that interest. *Id.* at 403; *Thomas v. Review Bd., Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). According to the California Supreme Court, the *Sherbert* twofold analysis "calls for a determination of, first, whether the application of the statute imposes any burden upon the free exercise of the defendant's religion, and second, if it does, whether some compelling state interest justifies the infringement." *Woody*, 394 P.2d at 816

(footnote omitted). A government action which passes the balancing test "must also meet the further requirements that (1) no action imposing a lesser burden on religion would satisfy the government's interest and (2) the action does not discriminate between religions, or between religion and nonreligion." *Molko*, 762 P.2d at 57 (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).[1]

[2] Under *Sherbert*, the plaintiff must first establish that the government has placed a substantial burden on his or her free exercise of religion. A substantial burden exists

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

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[1] Vernon argues that this case is governed by the analysis set forth in *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). We reject this claim because this Circuit has held that the *Smith* analysis is inapplicable to Free Exercise claims such as the plaintiff's. *See NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1305 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2965 (1992). Moreover, Congress recently restored the application of the compelling interest standard of *Sherbert* for all cases in which the free exercise of religion is substantially burdened. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (1993).

Thomas, 450 U.S. at 717-18. *See also Smith*, 494 U.S. at 897 (O'Connor, J., concurring); *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 832 (1989); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987).

The free exercise provision of the California Constitution also requires that plaintiffs demonstrate a burden upon their exercise of religion. The California Supreme Court has held that "[t]he first step requires an exploration into the particulars of this case to determine whether [the government action] imposes any burden upon the free exercise of . . . religion." *Woody*, 394 P.2d at 816. Relying principally on federal precedent, California courts have consistently required plaintiffs to show a significant burden upon the exercise of religious rights. *See, e.g., Molko*, 762 P.2d at 59-60 (finding that tort liability for deceptive recruitment practices imposes marginal burden on church's free exercise of religion); *Arias*, 725 P.2d at 681-82 (finding that use of a chapel microphone and monitoring system at Youth Authority school substantially burdens wards' exercise of religion); *Woody*, 394 P.2d at 818 (finding that statutory prohibition of peyote places substantial burden on religious practice because it results in a virtual inhibition of the practice of religion).

[3] The district court denied Vernon's free exercise claims because it determined that he failed to meet the threshold test of establishing that his right freely to exercise his religion was substantially burdened by the government's action in this case. We agree that Vernon has failed to demonstrate a substantial burden. As this Court has previously stated,

> [t]o show a free exercise violation, the religious adherent . . . had the obligation to prove that the governmental [action] burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987) (internal citations omitted), *aff'd sub nom., Hernandez v. Commissioner*, 490 U.S. 680, 699 (1988). *See also United States v. Turnbull*, 888 F.2d 636, 638-39 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990).

Applying this test, the district court found that "[i]t is thus inadequate for a plaintiff merely to allege that government action subjectively 'chills' his religious behavior, especially where the government action is neither regulatory, proscriptive, or compulsory in nature." Second Am. Order Granting Defs.' Mot. Summ. J. at 11. The district court relied upon *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), and *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989), to support its conclusion, and we find its application of these precedents to be correct.

In *Laird*, the plaintiffs challenged the Army's domestic surveillance of peaceful civilian activity, alleging a "chilling" effect on the exercise of their First Amendment rights caused not by any specific action of the Army

directed against the plaintiffs, but only by the mere existence and operation of the surveillance program in general. 408 U.S. at 3. The Supreme Court held that the plaintiffs lacked standing to challenge government action under the First Amendment because they had failed to set forth "a claim of specific present objective harm or a threat of specific future harm." *Id.* at 14. While the Court acknowledged that constitutional violations may arise from the deterrent or "chilling" effect of government regulations that fall short of a direct prohibition against the exercise of First Amendment rights, it found that in those cases "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* at 11.

In *Presbyterian Church*, the plaintiff churches brought an action against the Immigration and Naturalization Service ("INS") for violation of their First Amendment rights when INS agents surreptitiously recorded church services. Specifically, the churches alleged that as a result of the surveillance activities, members had withdrawn from active church participation, bible study groups were cancelled, church support declined, and congregants had become reluctant to seek counseling and were less open in prayers. 870 F.2d at 521-22. In holding that the churches had standing to bring their claims, this Court distinguished their "chilling effect" injury from that in *Laird*:

> *Laird* does not control this case. The churches in this case are not claiming simply that the INS surveillance has "chilled" them from holding

> worship services. Rather, they claim that INS surveillance has chilled *individual congregants* from attending worship services, and that this effect on the congregants has in turn interfered with the churches' ability to carry out their ministries. The alleged effect on the *churches* is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities.

Id. at 522 (emphasis in original). Although *Presbyterian Church* addressed the injury necessary to establish standing rather than constitutional injury and involved a church rather than an individual plaintiff, its distinction between mere subjective chill and concretely demonstrable injury is relevant to the analysis of this case.

[4] In his Complaint, Vernon alleges that the investigation has "chilled [him] in the exercise of his religious beliefs, fearing that he can no longer worship as he chooses, consult with his ministers and the elders of his church, participate in Christian fellowship and give public testimony to his faith without severe consequences. . . . " Compl. at 19. While Vernon testified that the investigation has interfered with neither his "relationship . . . [and] ability to communicate with God" nor his relationship with his pastor, he has alleged that "it has interfered with [his] freedom to worship in the way [he] want[s] without repercussions. . . . " Vernon Dep. of 12/20/91, Vernon Decl., Ex. 1 at 98. Like the plaintiffs in *Laird*, Vernon has failed to offer any evidence either to prove these allegations or to demonstrate that concrete harm has resulted from the investigation. There is simply no evidence that the City ever monitored Vernon's private religious activities.

[5] It is clear from the record that the investigation was restricted in its scope to consideration only of Vernon's on-duty activities and that it resulted in no disciplinary action being taken against Vernon. Gates Decl. at 3, ¶ 10. Thus, unlike the plaintiff churches in *Presbyterian Church,* Vernon has failed to show any concrete and demonstrable injury. While Vernon believes that it has been "implied" that he cannot consult with his church elders, he admits in his deposition testimony that no one has specifically told him that he cannot do so. Vernon Decl., Ex. 1 at 138-39. Rather, he argues that the investigation itself constitutes a statement to that effect. *Id.* at 138. In short, Vernon alleges that his "precious right to pursue [his] personal religion has been . . . deprived and . . . chilled." *Id.*

[6] Application of *Laird* is conclusive in this case. Vernon complains that the existence of a government investigation has discouraged him from pursuing his personal religious beliefs and practices – in order words, mere subjective chilling effects with neither "a claim of specific present objective harm [n]or a threat of specific future harm." *Laird,* 408 U.S. at 14. Such chilling effects are simply not objectively discernable and are therefore not constitutionally cognizable under *Laird.*

The district court correctly applied *Laird* and *Presbyterian Church* to determine that no substantial burden was demonstrated. To the extent that certain of Vernon's religious practices – namely, his consultation with church elders and his proselytism – were burdened at all, such burdens cannot be said to be "substantial." *Turnbull,* 888 F.2d at 639. Accordingly, we find that the district court did not err in determining that the plaintiff failed to

establish a substantial burden. Because Vernon has failed to prove that the City's investigation substantially burdened his religious rights, we need not proceed further with the *Sherbert* analysis.

D. *Establishment of Religion*

The United States Constitution prohibits any law "respecting an establishment of religion." U.S. Const. Amend. I. In language virtually identical to the Establishment Clause of the First Amendment, the California Constitution states that "[t]he Legislature shall make no law respecting an establishment of religion." Cal. Const. Art. I, § 4. It is clear that the provisions of the California Constitution are not dependent upon the federal constitution for their meaning. Cal. Const. Art. I, § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."). However, the California Supreme Court has suggested that decisions of the United States Supreme Court, although not binding on questions of state constitutional law, are nonetheless entitled to some degree of deference, especially when they address similar provisions. *See Raven v. Deukmejian,* 801 P.2d 1077, 1088 (Cal. 1990) (" 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.' ") (quoting *Gabriella v. Knickerbocker,* 82 P.2d 391, 393 (Cal. 1938)).

In language having no counterpart in the federal constitution, Article I, Section 4 of the California Constitution also guarantees the "[f]ree exercise and enjoyment of religion *without discrimination or preference. . . .* " Cal. Const. Art. I, § 4 (emphasis added). This Court has previously observed that while Article I of the California Constitution contains language quite similar to the religion clauses of the First Amendment, "it also provides that the state may not discriminate between religions or prefer one religion over another." *Hewitt*, 940 F.2d at 1565. We have held that the No Preference Clause prohibits any appearance that the government has allied itself with one specific religion. *Ellis*, 990 F.2d at 1524; *Hewitt*, 940 F.2d at 1566-67.

The No Preference Clause of the California Constitution has been interpreted by California state courts as being broader than the Establishment Clause of the First Amendment. *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 916 (Cal. Ct. App. 1989) (" 'California's constitutional provisions are more comprehensive than those of the federal Constitution.' ") (citations omitted); *Fox v. City of Los Angeles*, 587 P.2d 663, 665 (Cal. 1978) ("Preference thus is forbidden even when there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive."). In fact, a plurality of the California Supreme Court has noted that:

> The Attorney General of this state has observed that "[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the "no preference" clause, and California courts have interpreted the clause as

> being more protective of the principle of separation than the federal guarantee.

Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 820 (Cal. 1991) (en banc) (internal citations and quotations omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3026 (1992). In his concurrence in *Sands*, Justice Mosk described the No Preference Clause in the following way:

> the preference clause seeks to prevent government from giving *any* advantage to religion in California. The relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state.

Id. at 840 (emphasis in original) (footnote omitted). *See also Lucas Valley Homeowners Ass'n v. County of Marin*, 294 Cal. Rptr. 427, 435 (Cal. Ct. App. 1991).

Notwithstanding the clear differences between the state and federal guarantees, California courts have recognized that an analysis of establishment claims under the California Constitution frequently produces the same results as one under the federal constitution. *Okrand*, 254 Cal. Rptr. at 916. Noting that California cases addressing establishment claims under the state constitution are few, the *Okrand* court observed that a state court "may 'also consult principles of federal cases as they seem compelling guides to uncharted state grounds.' " *Id.* (quoting *Feminist Women's Health Ctr., Inc. v. Philibosian*, 203 Cal. Rptr. 918, 923 (Cal. Ct. App. 1984), *cert. denied*, 470 U.S. at 1052 (1985)). The *Okrand* court accordingly incorporated into its state law analysis the federal Establishment

Clause test, as delineated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Id.* at 917.

1. The *Lemon v. Kurtzman* Analysis

We initially observe that although the federal Establishment Clause cases for the most part have addressed governmental efforts to *benefit* religion or particular religions, it is clear that "the First Amendment forbids an official purpose to *disapprove* of a particular religion or of religion in general." *Church-of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217, 2226 (1993) (emphasis added). The government neutrality required under the Establishment Clause is thus violated as much by government disapproval of religion as it is by government approval of religion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also School Dist. of Abington v. Schempp*, 374 U.S. 203, 215 (1963). It is this mandated neutrality towards religion which Vernon contends was violated by the City's call for an investigation into the potentially improper impact of his religious beliefs upon his job as Assistant Chief of Police.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated the test to be applied to governmental actions and laws to determine their constitutionality under the Establishment Clause of the First Amendment. In order to pass constitutional muster, the challenged action must (1) have a secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. *Id.* at 612-13. The Supreme Court has held that the challenged practice must survive all three prongs

of the *Lemon* analysis in order to be held constitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("State action violates the Establishment Clause if it fails to satisfy any of these prongs."). This Circuit has consistently applied this test when examining Establishment Clause claims. *See, e.g., Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993) ("The challenged practice must survive all three prongs of the *Lemon* analysis in order to pass constitutional muster."), *cert. denied*, ___ U.S. ___, 114 S. Ct. 690 (1994); *Hanna Boys*, 940 F.2d at 1303 (same).

This Circuit has also held that the first prong of the *Lemon* test – whether the government action has a secular purpose – is satisfied if one purpose of the government action is secular. As the majority noted in *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3027 (1992), "[w]hen there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy the first *Lemon* prong." *Id.* at 773 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) and *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

Although it does not change the outcome in this case, we believe that the Supreme Court has articulated a slightly more stringent test, which requires that the "actual" or "primary" purpose of the government action be secular. *See Cammack*, 932 F.2d at 782-83 (D.W. Nelson, J., dissenting) ("I firmly believe that 'primary' or 'actual' [rather than 'a' or 'any'] secular purpose is both the test that the Supreme Court has articulated and a far preferable formulation."). In *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984), Justice O'Connor noted in her concurrence that the purpose prong "is not satisfied . . . by the mere

existence of some secular purpose, however dominated by religious purposes." *See also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (noting that a court must look to " 'whether government's actual purpose is to endorse or disapprove of religion' "); *Edwards*, 482 U.S. at 585 (" 'The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.' ") (quoting *Lynch*, 465 U.S. at 690 (O'Connor, concurring)). In any event, we find that the first prong of the *Lemon* test is satisfied.

The district court concluded that the investigation at issue in this case clearly had a valid secular purpose – to determine whether there was any basis to the allegations that Vernon's religious views were affecting his job performance in such a way as to violate either LAPD policies and regulations or the civil and constitutional rights of both police offices and citizens. Most importantly, it is undisputed that the defendants' actions were aimed at determining whether Vernon's alleged on-duty conduct violated the Establishment Clause.

[7] It is well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose. *Lemon*, 403 U.S. at 613. In *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3025 (1992), the Tenth Circuit recognized that a school's efforts to prevent possible violation of the Establishment Clause by ordering a teacher not to keep his bible on his desk during school hours constituted a valid secular purpose sufficient to satisfy the first prong of the *Lemon* test. In *Bishop v. Aronov*, 926 F.2d 1066, 1077-78 (11th Cir. 1991),

cert. denied, ___ U.S. ___, 112 S. Ct. 3026 (1992), the Eleventh Circuit similarly found that a university's efforts to avoid an establishment of religion violation by ordering a professor to refrain from interjecting religious remarks into his classes constituted a valid secular purpose.

[8] The valid secular purpose of the city's investigation is reflected in four documents. First, the Yaroslavsky letter of June 3, 1991, initially requesting the investigation clearly identifies the purpose of the investigation to be the determination of whether the operations and policies of the LAPD were being improperly compromised by Vernon.[2] Second, the Lomax memorandum of June 5, 1991, ordering the investigation directed that the purpose of the investigation of Vernon's on-duty conduct was to determine whether any LAPD policies were being violated.[3] Third, at the June 4, 1991 meeting of the Board of Police Commissioners, Sheinbaum similarly emphasized

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[2] In pertinent part, this letter stated:

> [Q]uestions have arisen recently about whether the views of Assistant Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department. . . . [W]hen one's views interfere with one's ability to perform official duties fairly and without bias, it is . . . a matter of public policy.

Decls., Ex. C at 45.

[3] In pertinent part, the memorandum stated:

> The Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures. It is toward this end that a thorough investigation is requested.

Lomax Decl., Ex. C.

the need to determine whether any LAPD policies or procedures had been violated.[4] Fourth, in his declaration, Chief Gates, who actually conducted the investigation, confirmed that Vernon's potential violation of the LAPD policy prohibiting the establishment of religion was the aim and scope of the investigation.[5]

[9] Under the second prong of the *Lemon* test, we must consider whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *Wallace*, 472 U.S. at 75; *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). *See also Cammack*, 932 F.2d at 777-78. We do not believe that the investigation of

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[4] According to the records of this meeting, he stated:

> The Police Commission will refer this matter to the Chief of Police with the request that the allegations be investigated with the specific purpose of determining whether or not Assistant Chief Vernon has engaged in any conduct that violates LAPD policies or procedures, or engaged in any conduct that has adversely impacted the Department.

Sheinbaum Decl., Ex. C at 9.

[5] In pertinent part, he stated:

> I received a memorandum from [Lomax] requesting that an investigation be conducted into . . . the *on-duty activities* of Assistant Chief Robert Vernon. . . . The inquiry was limited to the *on-duty activities* of Chief Vernon. . . . Just as LAPD policy prohibits the establishment or use of religious biases and preferences in the operation of the LAPD, it is also LAPD policy not to infringe on the free expression and religious rights of LAPD personnel.

Gates Decl. at 2-4.

Vernon sent such a message. As the Supreme Court has observed, "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). To determine the primary effect of the government action at issue in this case, it is useful to consider the documents released publicly prior to the commencement of the investigation.

The district court found no evidence in the record from which a reasonable person could infer any disapproval by the city government of Vernon's religion. The record is not quite that clear. For example, Yaroslavsky's June 3, 1991 letter, which he released to the press, made specific reference to Vernon's alleged "consultation with religious elders on issues of public policy." Decls., Ex. C at 45. The fact that the city expressly included within the scope of the investigation inquiries concerning "consultation with religious elders on issues of public policy" suggests that the city disapproved of such consultation, possibly due to the particular religious beliefs underlying such consultation.

[10] However, the key consideration in this second prong analysis is whether the government action "primarily" disapproves of religious beliefs. Notwithstanding the fact that one may infer possible city disapproval of Vernon's religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation. The primary

purpose of the government action was the investigation of any possible impermissible or illegal on-duty conduct of Vernon. This is supported not only by the express language of the documents requesting and ordering the investigation, but also by the prominent disclaimers contained therein. For example, Yaroslavksy's June 3, 1991 letter stated that "Chief Vernon is, of course, entitled to his personal religious and political views. I vigorously defend his right to his views." *Id.* Also, Lomax's June 5, 1991 memorandum similarly stated, "It should be clear from the outset that it is not the intention of this Board to abridge the First Amendment rights of Chief Vernon or anyone else, as each member of this Commission would vigorously protect and defend those rights." Lomax Decl., Ex. C. And Chief Gates has stated that the investigation was so limited.

Neither the pre-investigation statements nor the investigation itself could reasonably be construed to send as its *primary* message the disapproval of Vernon's religious beliefs; thus, the government action satisfies the second prong of the *Lemon* test.

The third prong of the *Lemon* test requires the court to examine whether the government action results in " 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 613. As this Court has previously noted, "[t]he entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack*, 932 F.2d at 780. We find that this prong has been satisfied. In *Lemon*, The Supreme Court was concerned with administrative and political entanglement. Vernon argues that the City's

actions in this case constituted both administrative and political entanglement.

Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion. *Lemon*, 403 U.S. at 619-22; *Lynch*, 465 U.S. at 684. *See also Cammack*, 932 F.2d at 781. The *Lemon* Court articulated three factors to be weighed in determining this type of excessive entanglement: first, the character and purpose of the religious institution affected by the government action; second, the nature of the activity that the government mandates; and third, the resulting relationship between the government and the religious institution. *Lemon*, 403 U.S. at 615. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 393 (1990). The Ninth Circuit has adopted this analysis. *See, e.g., Hanna Boys*, 940 F.2d at 1303, 1304-05; *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1369 (9th Cir. 1986); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982).

Turning to the first factor, although the plaintiff fails to present a clear argument on this point, he appears to suggest that at least two institutions are potentially affected by the government's investigation in this case. First, he claims that his church – the Grace Community Church – is affected by the negative publicity surrounding the investigation. Second, he suggests that all other religious institutions are potentially affected by the risk that such an investigation will be launched against them. The character and purpose of these institutions is clearly religious in nature. It must be noted, however, that the government's investigation was not directed at the Church; instead, even drawing all reasonable inferences

in Vernon's favor, the government investigation at most only collaterally affected the Church through its inquiry whether Vernon consulted with church elders on matters of police policy.

With respect to the second factor, the nature of the activity mandated by the government – namely, investigation of the impact of religious beliefs on Vernon's on-duty job performance – cannot easily be separated from the religious mission of the institutions identified above as being affected by the government action in this case. Significantly, the observance of religious practices and veneration of religious beliefs constitute the central goal of these institutions. The government's action is thus closely connected to the institutions' religious charge.

[11] However, consideration of the third factor – the resulting relationship between the government and the religious institutions – establishes that the government action in this case does not constitute administrative entanglement. There is simply no continuing or systematic investigation of religious beliefs in this case. In fact, as noted above, several specific precautions were taken by the defendants to limit the scope and duration of the investigation. For example, in his June 3, 1991 letter, Yaroslavsky required that the investigation be conducted "thoroughly and expeditiously" and noted that "[i]f [the allegations] are without merit, then they should be laid to rest at once." Decls., Ex. C at 45. Also, in her June 5, 1991 memorandum to Chief Gates, Lomax requested that "a progress report be presented . . . on June 25, 1991, and that the final report be completed as early as possible in July, 1991." Lomas Decl., Ex. C. In fact, the investigation was officially closed on November 26, 1991 – less than six

months following its commencement. Given the relatively short duration of the investigation, it is unlikely that the government action at issue created either the reality or the appearance of on-going government interference in church affairs. *See Hanna Boys*, 940 F.2d at 1304 (finding no entanglement where National Labor Relations Board jurisdiction over church-owned school required government involvement only with respect to specific charges filed on behalf of employees and where there was no continuing or systematic monitoring of church activities).

Vernon cites two cases finding entanglement in situations he asserts were similar. In *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979), the First Circuit found that the Puerto Rico Department of Consumer Affairs violated the Establishment Clause when it subpoenaed documents of the Roman Catholic Church in order to investigate the operating costs of parochial schools and the inflationary spiral reflected in the costs of private education in Puerto Rico. The court concluded that the acts of the Department constituted an impermissible entanglement of the affairs of church and state. *Surinach* is distinguishable from this case because the Department exercised "untrammelled" investigatory powers much broader than those of the city in this case. Moreover, the statute authorized the Department to establish and inspect price control over all goods and services for consumer use and consumption, suggesting that the government program had the "self-perpetuating and self-expanding propensities" which have traditionally alerted courts to an increased danger of an unconstitutional degree of entanglement. *Id.* at 78 (quoting *Lemon*, 403 U.S. at 624). Because the government

action in this case lacks the on-going regulatory potential of that in *Surinach*, the First Circuit's reasoning is not persuasive here.

Vernon also cites *Word of Faith Outreach Ctr. Church, Inc. v. Morales*, 787 F. Supp. 689 (W.D. Tex. 1992), *rev'd on other grounds*, 986 F.2d 962 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 82 (1993), in which the district court relied heavily on the reasoning in *Surinach* and found that the Attorney General's investigation of a church's financial records, documenting revenues and expenditures, launched in response to a television news report concerning alleged illegal activities of the church was unconstitutional because it represented undue entanglement under the Establishment Clause. The court reasoned that because (1) the scope of the investigation was unlimited; (2) the Attorney General would be required to make determinations as to which of the church's pamphlets, advertisements, television broadcasts, sermons, etc. are purely religious and which are secular; and (3) the investigation "could" ultimately give rise to both on-going monitoring activity and injunctive action to ensure compliance, the government action was constitutionally invalid. *Id.* at 702. The government action in this case is distinguishable for at least three reasons: first, its scope was limited; second, it had a justifiable secular purpose; and third, it did not require the government either to make religious versus secular determinations or to engage in on-going monitoring activity.

In *Cammack*, 932 F.2d at 781, the Ninth Circuit noted that the Supreme Court has usually found excessive administrative entanglement in situations involving

either state aid to groups affiliated with a religious institution, such as parochial schools, *see, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon, supra*, or where religious employees and public employees must work closely together, *Aguilar*, 473 U.S. at 412-14 (program required on-site monitoring of sectarian schools by public authorities and coordinated planning by public and sectarian figures); *Walz v. Tax Commission of New York*, 397 U.S. 664, 674-75 (1970) ("the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance"). The facts of this case do not conform to any of those patterns. In fact, the plaintiff has presented no evidence at all to suggest that the challenged government action will be ongoing and continuous. While we by no means endorse "witch hunts," serious charges – even if thinly documented – against police officers regarding their on-duty performance must be investigated.

In *Lemon*, the Supreme Court was also concerned about political entanglement, or political divisiveness resulting from government action which divides citizens along political lines. *Lemon*, 403 U.S. at 622-23; *Aguilar*, 473 U.S. at 414. Vernon's reliance on political entanglement to establish the unconstitutionality of the investigation, however, is misplaced.

First, the Supreme Court has never relied on political divisiveness as an independent ground for holding a government practice unconstitutional. *Lynch*, 465 U.S. at 684. As Justice O'Connor observed in *Lynch:*

> Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation . . . itself may affect the political response to the government practice. Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement. *Id.* at 689 (O'Connor, J., concurring). The Ninth Circuit follows this approach. *Cammack,* 932 F.2d at 781 ("Although political divisiveness has been considered in establishment clause cases . . . , it has never been relied on 'as an independent ground for holding a government practice unconstitutional.' ").

Second, the political entanglement inquiry seems to be applied mainly in cases involving direct financial subsidies paid to parochial schools or to teachers in parochial schools. *Lynch,* 465 U.S. at 684; *Mueller v. Allen,* 463 U.S. 388, 403-04 n.11 (1983). *See also Aguilar,* 473 U.S. at 429 (O'Connor, J., dissenting).

Third, there is simply no evidence that the government action in this case has given rise to political divisiveness. While such political divisiveness is certainly possible under the circumstances of this case, Vernon has failed to provide any evidence of it.

[12] Because the government's action satisfies all three prongs of the *Lemon* test, it does not violate the Establishment Clause. Accordingly, we affirm the district court's grant of summary judgment in favor of the defendants on this claim.

2. The No Preference Clause Analysis

In *Okrand v. City of Los Angeles,* 254 Cal. Rptr. 913 (Cal. Ct. App. 1989), the court observed that California courts should not view the *Lemon* test as absolute, but rather " 'as a touchstone with which to identify instances where the objectives of the establishment clause have been compromised.' " 254 Cal. Rptr. at 917 n.6 (quoting *Johnson v. Huntington Beach Union High Sch. Dist.,* 137 Cal. Rptr. 43, 48 (Cal. Ct. App.), *cert. denied,* 434 U.S. 877 (1977)). Thus, after finding that all three prongs of the *Lemon* test were satisfied, the *Okrand* court next considered the No Preference Clause to ascertain "whether the governmental action exhibits a preference for a religion or a religious belief." *Id.* at 921 (citing *Fox,* 587 P.2d at 665).

An establishment claim that is brought under the California Constitution sometimes requires separate analysis from a claim based on the First Amendment because the California Constitution's No Preference Clause is broader than the First Amendment's Establishment Clause. However, in this case the district court observed that "California establishment doctrine is more expansive than its federal counterpart only insofar as it encompasses more government action which aids religion, not more government action which hinders or stigmatizes

religion." Second Am. Order Granting Def.'s Mot. for Summ. J. at 2 n. 1.

[13] We agree. Although the No Preference Clause requires that we also consider whether the government action in this case exhibited a preference for a religion or religious belief, Vernon has not alleged (and could not allege) any such preference. By contrast, Vernon contends only that the government action unconstitutionally discriminated against or disfavored his religion. Our examination of California case law has revealed no cases in which the No Preference Clause has been interpreted to be more expansive than the federal constitution as regards government action which disfavors religion. Therefore, we conclude that the government's action in this case did not violate the establishment provision or the more expansive No Preference Clause of the California Constitution.

[14] Accordingly, we find no violation of Vernon's state or federal constitutional rights.

E. *Attorneys' Fees*

We deny the defendants' request for attorneys' fees pursuant to 42 U.S.C. § 1988. The same standard is applied when analyzing requests for attorneys' fees at both the trial and appellate levels. *See Patton v. County of Kings,* 857 F.2d 1379, 1381 (9th Cir. 1988).

The authorization of an award of attorneys' fees under 42 U.S.C. § 1988 applies differently to prevailing

defendants than to prevailing plaintiffs. Plaintiffs prevailing in a civil rights action should ordinarily recover attorneys' fees unless special circumstances would render such an award "unjust." However, a prevailing defendant should not routinely be awarded attorneys' fees simply because he has succeeded, but rather only where the action is found to be "unreasonable, frivolous, meritless, or vexatious." *Roberts v. Spalding*, 783 F.2d 867, 874 (9th Cir.), *cert. denied*, 479 U.S. 930 (1986) (internal citations omitted). Thus the mere fact that a defendant prevails does not automatically support an award of fees. *Patton*, 857 F.2d at 1381; *Coverdell v. Department of Social & Health Serv.*, 834 F.2d 758, 770 (9th Cir. 1987).

~~[15]~~ As noted above, this Court denies a defendant's requests for attorneys' fees unless the action is frivolous, unreasonable, or without foundation. *Coverdell*, 834 F.2d at 770. An appeal is considered frivolous in this Circuit when the result is obvious or the appellant's arguments of error are wholly without merit. *McConnell*, 661 F.2d at 118. Neither the action brought by the plaintiff nor his appeal to this Court can be characterized as frivolous, unreasonable, or without foundation. Accordingly, we deny the attorneys' fees request.

IV.

CONCLUSION

For the reasons articulated above, the district court's decision is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT L. VERNON, Plaintiff, v. CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES; ZEV YAROSLAVSKY, Individually and as Los Angeles City Councilman; STANLEY SHEINBAUM, Individually and as Commissioner; JESSE BREWER, Individually and as Commissioner, Board of Police Commissioners; and MELANIE LOMAX, and individual, Defendants.	CV 91-5994 SVW (Sx) SECOND AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Apr. 8, 1992)

I. INTRODUCTION

This is the third motion filed in this § 1983 action for alleged violations of the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1] On November 4, 1992, Plaintiff filed a Motion for

[1] In fact, Plaintiff brought his claims under both the U.S. Constitution and the California Constitution. The existence of both types of establishment claims can sometimes require two sets of analyses, since although the respective Due Process and

Preliminary Injunction, which was argued on December 17, 1991 and subsequently denied. Plaintiff then filed a Motion to Strike on January 13, 1992, which was argued

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Equal Protection analyses under both constitutions are the same, *see, e.g., Owens v. City of Signal Hill,* 154 Cal.App.3d 123, 201 Cal.Rptr. 622, (1984), *Duffy v. California State Personnel Board,* 232 Cal.App.3d 1, 283 Cal.Rptr. 622 (1991), the California Constitution contains three separate establishment provisions whose scope is arguably wider than that of the Establishment Clause in the U.S. Constitution.

In the present case, however, the Court's analysis can – and does – focus on Plaintiff's federal establishment claim and remain consistent with California law. Owing to the highly unusual facts of this case, there appear to be no directly applicable cases – either state or federal – for the Court to rely upon, and therefore the Court in reaching its decision relies on general principles common to both federal and California constitutional doctrine. For instance, the Court relies heavily upon the *Lemon* test, which California courts have explicitly adopted. *See. e.g., Okrand v. City of Los Angeles,* 207 Cal.App.3d 566, 573, 254 Cal.Rptr. 913, 917 (1989).

In addition, the Court below also relies heavily upon a broad notion of the "negative" aspect of the federal Establishment Clause: i.e., its prohibition of government action which inhibits, or disfavors religion. There is no case law suggesting that the California establishment provisions have been interpreted even more broadly in this sense. By all appearances, California establishment doctrine is more expansive than its federal counterpart only insofar as it encompasses more government action which aids religion, not more government action which hinders or stigmatizes religion. *See, e.g., Sands v. Morongo Unified School Dist.,* 53 Cal.3d 863, 809 P.2d 809 (discussing the especially broad scope of California's explicit no government *aid* and no government *preference* provisions). Consequently, the broader scope of the California provisions does not affect this case inasmuch as there is therein no issue whatsoever of government aid or preference. There is, in turn, no reason to think that this case would come out any differently under California law.

on February 3, 1992, and which the Court denied except as to that part of the motion which related to an abstention defense raised in Defendants' Answer. Defendants have now filed a Motion for Summary Judgment. For the reasons given below, this motion is GRANTED.

II. BACKGROUND

Plaintiff Robert L. Vernon is the Assistant Chief of the Los Angeles Police Department ("LAPD"). He is also the Director of LAPD's Office of Operations and, as such, is in charge of eighty-five percent of the operations of the 8,300-member police force. As Director of the Office of Operations, Plaintiff also commands all patrol units and most detectives.

Defendant Stanley Sheinbaum is a Police Commissioner of the City of Los Angeles. On May 25, 1991, Sheinbaum questioned publicly whether the religious views of Plaintiff, who is a Fundamentalist Christian, were having an impermissible effect on his on-duty performance. Specifically, Sheinbaum stated that he wanted to know if Plaintiff still held views attributed to him by an article in the May 1991 edition of the *Los Angeles Magazine*, and if so, whether they "impacted upon" the LAPD (the "May 25, Sheinbaum Public Statement"). According to the *Los Angeles Magazine* article, Plaintiff, in a six-part series of audiotapes produced by Plaintiff's Church, "condemns homosexuality, depicts cops as 'ministers of God,' [and] instructs churchgoers that 'the woman is to be submissive to the man.' " "The Dan Quayle Principle Strikes Again," Los Angeles Magazine, May 1991, at 28.

Defendant Zev Yaroslavsky is one of several City Councilmen conferred with oversight responsibility for the LAPD. On June 3, 1991, Yaroslavsky, upon receiving evidence suggesting possible improprieties by Plaintiff in the performance of his duties as Assistant Chief, sent a letter to Defendant Melanie Lomax, acting President of the Board of Police Commissioners ("Board"), requesting that an investigation be conducted to determine whether any such improprieties had in fact occurred (the "Yaroslavsky Letter"). The letter stated, in full:

> As you [Lomax] are aware, questions have arisen recently about whether the views of Assistant Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department. During his confirmation hearing Commissioner Yamaki indicated a willingness to conduct an investigation of this matter. I am writing today to confirm my interest in such a review.
>
> Chief Vernon is, of course, entitled to his personal religious and political views. I vigorously defend his right to his views. However, when one's views interfere with one's ability to perform official duties fairly and without bias, it is no longer a personal matter, but a matter of public policy.
>
> Allegations concerning promotion, hiring and treatment of gays and lesbians, and, most recently, the consultation of religious elders on issues of public policy, deserve to be reviewed. If the allegations have merit, then they should be addressed and the problems corrected. If they are without merit, then they should be laid

to rest at once. It is critical that this issue be dealt with thoroughly and expeditiously.

The allegations which apparently prompted Yaroslavsky to write the letter (in addition to those mentioned in the letter)[2] were that: (1) Plaintiff had justified a secret, unauthorized investigation into Chief Daryl Gates' off-duty activities by proclaiming, "God wants me to be Chief;" (2) Plaintiff gave unfair advantages in hiring and promotion decisions to fellow church members within the LAPD by manipulating LAPD test scores; (3) Plaintiff was known throughout the LAPD as a "Bible Thumper" and head of the LAPD's "God Squad," because he injected his religious views into his official LAPD activities; (4) Plaintiff was influenced by his religious views in ordering no arrests at anti-abortion demonstrations, while seeking increased arrests at pro-gay rights rallies; and in attempting to thwart the progress of homosexual and female officers within the LAPD; (5) Plaintiff had pressured LAPD officers to attend religious meetings both at his church and at LAPD headquarters; and (6) Plaintiff has used religious symbols, such as images of a fish, in official correspondence. Yaroslavsky Decl. ¶¶ 3-9.

In response to the request for an investigation into Plaintiff's on-duty conduct from Councilman Yaroslavsky, which was made known to the entire Board, Defendant Sheinbaum moved on June 4, 1991 for the Board to request Chief Gates to conduct such an investigation. The motion was unanimously approved (the "Board Motion"). Later the same day, both Sheinbaum

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[2] In his papers, Plaintiff does not appear to deny the existence of these allegations, only their truth.

and Lomax made public their request for an investigation (the "June 4 Sheinbaum and Lomax Public Statements"). Sheinbaum stated that "[t]he views of the assistant Chief are his own. He has every right to them. . . . What bothers me . . . is that some allegations do claim it has impacted on his role as Assistant Police Chief. That is going to be up to Chief Gates to determine." Sheinbaum also referred to the Yaroslavsky Letter and the allegations contained therein. Defendant Lomax, for her part, essentially agreed with what Sheinbaum said, and stood behind her call for an investigation.

On June 5, 1991, Lomax, on behalf of the Board, sent an official request to Chief Gates asking that an investigation be conducted as to any possible improprieties in Plaintiff's on-duty conduct (the "Lomax Letter"). The letter was sent to Chief Gates pursuant to a Board policy requiring that complaints from the general public or elsewhere alleging police misconduct be turned over to the Chief of Police for investigation. The Lomax Letter stated, in full:

> The Board of Police Commissioners requests that an investigation be conducted into certain issues raised by Councilman Yaroslavsky concerning the on-duty activities of Assistant Chief Robert L. Vernon.
>
> The investigation should include a determination in the areas of the promotions, hiring and treatment of gays, lesbians and women, and the consultation of religious elders on issues of police policy.

> It is respectfully requested that findings be made as to whether Chief Vernon has sent official communications from this office which contain or have displayed religious symbols. It is also specifically requested that a determination be made as to whether employees who have been promoted by Chief Vernon have received preferential treatment through their affiliations with his church. This determination is to include both sworn and civil personnel.
>
> It should be clear from the outset that it is not the intention of this Board to abridge the First Amendment rights of Chief Vernon or anyone else, as each member of this Commission would vigorously protect and defend those rights. The Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures. It is toward this end that a thorough investigation is requested.
>
> It is requested that a progress report be presented in Closed Session on June 25, 1991, and that a final report be completed as early in July, 1991, as possible.

Shortly after receiving the Lomax Letter, Chief Gates began the investigation in accordance with policies established by the Board and the LAPD. According to Chief Gates, the investigation focused entirely on Plaintiff's on-duty conduct and no inquiry was ever made into Plaintiff's religious beliefs. Gates Decl. ¶ 10.[3] In the course of

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[3] Nowhere in his papers does Plaintiff offer any evidence contradicting Gates' description of the investigation. Indeed, as

the investigation, Chief Gates found that the allegations about Plaintiff's on-duty wrongdoing could not be substantiated, and reported these findings to the Board on November 26, 1991. The investigation was subsequently terminated, and the Board took no further action with respect to the allegations about Plaintiff.[4]

On November 4, 1991, Plaintiff filed a § 1983 Complaint against the City, the City Council, the Board, Yaroslavsky, Sheinbaum, Brewer, and Lomax, the thrust of which was that the lead-up to the investigation and the investigation itself violated Plaintiff's constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5] In

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mentioned below, at oral argument held on March 9, 1992, Plaintiff appeared to concede that his case does not concern any [sic] the Gates investigation itself, but only what preceded it.

[4] Defendants' actions might therefore be summed up as follows. Upon learning of allegations of wrongdoing on the part of the second highest police official in Los Angeles, a Police Commissioner expressed interest in learning more about the allegations, and a member of the City Council with oversight responsibility for the LAPD wrote to the Board of Police Commissioners requesting an investigation into the allegations. The Board thereupon followed its usual procedure for addressing allegations of police wrongdoing by directing the Chief of Police to conduct an investigation to determine whether any wrongdoing had in fact occurred. The Chief reported back some months later that he had found no wrongdoing, and no further action was taken in the matter.

[5] Plaintiff stated at a hearing held on March 9, 1992 that only statements and incidents prior to the investigation conducted by Chief Gates, and not the investigation itself, violated Plaintiff's constitutional rights. This statement appeared to con-

ruling below on Defendants' Motion for Summary Judgement, the Court will first discuss all of Plaintiff's claims as they relate to Defendants Yaroslavsky and Brewer, and then each of Plaintiff's claims *ad seriatum* as they relate to the rest of Defendants.

III. DEFENDANT YAROSLAVSKY'S LIABILITY WITH RESPECT TO ALL OF PLAINTIFF'S CLAIMS

Plaintiff alleges that Defendant Yaroslavsky violated his constitutional rights by asking questions about Plaintiff in a legislative hearing, and requesting that the Police Commission investigate Plaintiff's on-duty activities. Inasmuch as the conduct challenged by Plaintiff falls well within the scope of Yaroslavsky's legislative offices, however, it is shielded by legislative immunity. *See, e.g., Tenny v. Brandhow*, 341 U.S. 367, 379, 71 S.Ct. 783, 789 (1951) (Black, J., concurring) (noting the "long-standing and

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tradict the position Plaintiff had been taking hitherto. For instance, in his Motion for Preliminary Injunction papers, Plaintiff alleged that "the investigation is violative of the religious liberty provisions of the federal and California constitutions . . . ." Pl.'s Mem. P. & A. Supp. Mot. for Prelim. Inj. Order at 12, 25, 29.

Rather than risk prematurely disposing of either Plaintiff's argument as to the investigation itself, or his argument concerning certain things that preceded the investigation, the Court will address *both* arguments in the discussion that follows. In its discussion, the Court will refer to the lead-up to the investigation as the "pre-investigation," and will take the pre-investigation to consist of: (1) the May 25 Sheinbaum Public Statement, (2) the Yaroslavsky Letter, (3) the Board Motion, (4) the June 4 Sheinbaum and Lomax Public Statements, and (5) the Lomax Letter.

wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. . . . "); *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1046 (9th Cir. 1988). Plaintiff may therefore obtain neither damages nor injunctive relief for Yaroslavsky's conduct. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821 (1975) (reasoning that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation. . . . "); *see also Supreme Court of Va. v. Consumers Union of the United States*, 446 U.S. 719, 732 & n.10, 100 S. Ct. 1967, 1974 & n.10 (1980); *Traweek v. City and County of San Francisco*, 659 F.Supp. 1012, 1030 (N.D. Cal. 1984), *aff'd.* 920 F. 2d 589 (9th Cir. 1990) (*affirmed* on other grounds). *But see Giannini v. Real*, 711 F. Supp. 992, 998 (C.D.Cal. 1989) ("[L]egislative immunity does not entitle a defendant to immunity from suits for declaratory or injunctive relief."), *aff'd*, 911 F. 2d 354 (9th Cir. 1990) (affirming without addressing district court's analysis of legislative immunity); *Levanti v. Tippen*, 585 F. Supp. 499, 505 (S.D. Cal. 1984) (noting that "[o]nly plaintiff's action for injunctive or other prospective relief remains before this Court . . . [s]ince the Court has ruled in favor of defendants' immunity from damages liability on the basis of . . . legislative immunity. . . . ").

IV. DEFENDANT JESSE BREWER'S LIABILITY WITH RESPECT TO ALL OF PLAINTIFF'S CLAIMS

According to the Complaint, Defendant Brewer's participation in the events surrounding the investigation was limited to testifying under oath about his knowledge of the LAPD, including Plaintiff, before an independent panel investigating LAPD operations, and telling Plaintiff he would need to check with the Police Commission before releasing documents regarding the investigation. Such conduct is insufficient to establish liability for the constitutional violations alleged by Plaintiff. Brewer's testimony before the panel was privileged. *See Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018 (1973); *Minpeco, S.A. v. Conticommodity Servs.*, 844 F. 2d 856 (D.C. Cir. 1988). His hesitation to release documents to Plaintiff did not rise to the level of a constitutional deprivation of any kind. Finally, his connection to the pre-investigation and the investigation was simply too attenuated to render him liable for any harm caused by them. Accordingly, Defendants' motion with respect to Brewer is GRANTED.

V. PLAINTIFF'S FREE EXERCISE CLAIM

In order to prevail on a Free Exercise claim, a plaintiff must pass a "difficult test," *U.S. v. Turnbull*, 888 F. 2d 636 (9th Cir. 1989), *cert. denied*, 1990 US LEXIS 3886, 111 S. Ct. 78 (1990), which Judge, now Justice Kennedy succinctly set forth as follows in *Graham v. Commissioner*, 822 F. 2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680, 109 S. Ct. 2136 (1989):

> To show a free exercise violation, the religious adherent has the obligation to prove that a

> government [action] burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

It is thus inadequate for a plaintiff merely to allege that government action subjectively "chills" his religious behavior, especially where the government action is neither regulatory, proscriptive, or compulsory in nature. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 2326 (1972); *The Presbyterian Church (U.S.A.) v. United States*, 870 F. 2d 518 (9th Cir. 1989).

The Court finds that Plaintiff has failed the "difficult test" imposed by the Free Exercise clause. There is no evidence in the record showing that either the pre-investigation or the investigation imposed upon Plaintiff any palpable burden, let alone a "substantial" one. *Graham*, 822 F. 2d at 851. Moreover, Plaintiff has not alleged, let alone offered any evidence showing that the investigation "interfer[ed] with a tenet or belief that is central to [the] religious doctrine" of Christian Fundamentalism. *Id.* As such, Plaintiff here is much like the plaintiff in *Laird*, whose action was dismissed largely because he had merely "allege[d] that the exercise of [his] First Amendment rights [were] being chilled by the mere existence of a governmental investigative and data-gathering activity." *Laird*, 408 U.S. at 13-14, 92 S. Ct. at 2324. As a matter of law, therefore, Defendants' motion with respect to

Plaintiff's Free Exercise claim with respect both to the pre-investigation and to the investigation is GRANTED as to all Defendants.[6]

VI. PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM

A. Background

The typical Establishment Clause case arises out of governmental action which benefits a particular religion, *see, e.g., Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1984), or favors or promotes one religion over another, *see. e.g., Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355

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[6] Since *Turnbull* and *Hernandez*, the Supreme Court has handed down its watershed decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), in which it held that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.*, 110 S.Ct. at 1600. It is unclear, however, whether *Smith*, which did not purport to overrule *Turnbull* or *Hernandez*, should be the touchstone of the Court's Free Exercise analysis in the present case. *Smith* and its Ninth Circuit progeny appear to address the application of valid and neutral *laws* exclusively, *see, e.g., American Friends Service Committee v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991), whereas the case before this Court concerns no laws of any kind, but merely government investigative activity. Even assuming, *arguendo*, that *Smith* does encompass such activity, Plaintiff's Free Exercise claim still fails. There is no evidence in the record indicating that the pre-investigation or the investigation prohibited conduct mandated by Plaintiff's religious beliefs. *Smith*, 110 S. Ct. at 1599. Moreover, even if the pre-investigation or the investigation had in some manner prohibited Plaintiff's practice of Fundamentalism, there is no evidence that that prohibition would have been anything but an "incidental effect" of Defendants' investigative activity. *Id.* at 1600.

(1984). Consequently, the Establishment Clause is commonly identified with the prohibition of governmental action that affirmatively promotes one religion, whether at the expense of one or more other religions, or not.

Nonetheless, the Establishment Clause prohibits more than just governmental action which benefits a particular religion. As strictly as the Establishment Clause prohibits governmental action that affirmatively approves of a particular religion, it also prohibits governmental action that in some manner merely expresses *disapproval* of, or *disfavors* a religion. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 16, 67 S. Ct. 504, 511-12 (1947); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953 (1985) (White, J.) (inquiring into whether certain burdensome Department of Labor recordkeeping requirements imposed upon a religious institution violated the Establishment Clause merely by inhibiting religion); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187, 190 (D. Nev. 1988) (suggesting that the Establishment Clause may sometimes be violated when "the state [merely] acts adversely to a religious institution's interests"); *Bishop v. Aronov*, 926 F. 2d 1066, 1077 (11th Cir. 1991) (examining whether restrictions placed upon a Christian professor by a University "are themselves an establishment of religion because they exclude only Christian views").

One reason for this "negative" aspect of the Establishment Clause is that the Establishment Clause "require[s] . . . separation of state government from religion," *McCollum v. Board of Educ.*, 333 U.S. 203, 211, 68 S. Ct. 461, 465 (1948), which is achieved by "strict and lofty neutrality," *Abington v. Schempp*, 374 U.S. 203, 218, 83 S.

Ct. 1560, 1569; *see also Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968) ("The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt or oppose any religion. . . . This prohibition is absolute. . . . "); *Roberts v. Madigan*, 702 F. Supp. 1505, 1551 (D. Colo. 1989) ("The Establishment Clause mandates government neutrality concerning religion. . . . "), *aff'd*, 921 F. 2d 1047 (10th Cir. 1990); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F. 2d 1210, 1217 (5th Cir. 1991) ("We recognize that the establishment clause exists to ensure government neutrality toward religion. . . . "). The government neutrality mandated by the Establishment Clause is clearly violated as much by government disapproval of a particular religion as by government approval of one. *See, e.g., Quappe v. Endry*, 772 F. Supp. 1004, 1013 (S.D. Ohio 1991) ("[T]he state is to refrain from engaging in or encouraging activity that could be understood to make it a partisan in religious matters. This neutrality is a decidedly double-edged sword, however, for just as the state may do nothing to advance religion, neither may it do anything which would inhibit religion. . . . ").

More generally, government approval and government disapproval of religion both violate the Establishment Clause inasmuch as they lead to essentially the same result. Express government approval of a particular religion "sends a message to . . . adherents that they are insiders, favored members of the political community," and, by implication, sends a message to "to nonadherents that they are outsiders, not full members of the political community." *Lynch*, 104 S. Ct. at 1355, 1367 (O'Connor, J., concurring). Express governmental disapproval has a

parallel effect: it "sends a message" to adherents of that religion that they are "outsiders," and by implication, sends a message to nonadherents of that religion – i.e. members of all other religions – that they are, in comparison, "favored members of the . . . community." *Id.*

Governmental action that merely disfavors, rather than endorses, a particular religion, thus can run afoul of the Establishment Clause in two related respects. It can violate the principle of neutrality in which the Establishment Clause is so firmly rooted, inasmuch as to be neutral means not to be inclined one way or the other, but rather to be indifferent or impartial. *The American Heritage Dictionary* (2d college ed. 1985). Such action can also run afoul of the Establishment Clause insofar as government disapproval of one religion effectively draws a line between acceptable religions and unacceptable religions, expressing implied approval of those religions not expressly disapproved of.

In the present case, Plaintiff has never alleged that the pre-investigation and the investigation constituted direct endorsement or approval by Defendants of any particular religion, or of religion generally. What the foregoing analysis indicates, however, is that the absence of affirmative endorsement by Defendants of a particular religion is not fatal to Plaintiff's Establishment Clause claim. The mere fact that Defendants' actions might potentially have constituted disapproval of, or stigmatism of Christian Fundamentalism allows Plaintiff to at least state an Establishment Clause claim.

B. The Lemon Test

To determine whether or not government action comports with the Establishment Clause, the Court must first apply the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 2111 (1971). Challenged government action runs afoul of the *Lemon* test if it (1) lacks a secular purpose; *or* (2) has the primary effect of advancing or inhibiting religion; *or* (3) results in excessive entanglement of government with religion. *Id.* Below, the Court will examine each one of the three prongs of the *Lemon* test, both with regard to the pre-investigation, and to the investigation.

C. Application of the Lemon Test

1. The Secular Purpose Prong[7]

(a) The Investigation

In *Lynch*, the Supreme Court, through Chief Justice Burger (who also authored the opinion in *Lemon v. Kurtzman*), held that so long as *one* purpose of state action is a secular purpose, the first prong of the *Lemon* test is satisfied. *Lynch*, 465 U.S. 668, 104 S. Ct. 1355; *see also Wallace*, 472 U.S. at 27-28, 105 S. Ct. at 2489 ("[E]ven though a statute that is motivated in part by a religious purpose may satisfy the first [*Lemon* prong], the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance [or inhibit] religion"

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[7] *See Board of Educ. of Westside Community Schools v. Mergens*, ___ U.S. ___, ___, 110 S. Ct. 2356, 2371 (1990) ("[W]hat is relevant is the . . . purpose . . . not the possible religious motives [behind the government action]. . . . ").

(citations omitted)); *Cammack v. Waihee*, 932 F. 2d 765, 773 (9th Cir. 1991) ("When there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy the first *Lemon* prong. . . . ").

The question raised in this case is thus whether there was *a* secular purpose for the investigation. If there was one, then the investigation does not run afoul of the first prong of the *Lemon* test, regardless of whether the investigation may have had additional purposes, one or more of which might have been religious in nature.

The investigation clearly did have a valid secular purpose: to determine whether there was any basis to allegations that Plaintiff's religious views were impacting his job performance in such a way as to violate the civil and constitutional rights of police officers, and LAPD policies and rules. *See, e.g., Roberts*, 921 F. 2d 1047 (finding that a school district had a "secular purpose" when it acted to prevent possible Establishment Clause violations by ordering a teacher, among other things, not to keep his bible on his desk during school hours); *Bishop*, 926 F. 2d 1066 (finding that a university, in instructing a professor to refrain from interjecting religious beliefs and/or preferences during instructional time periods, had a "valid secular purpose"); *see also Lemon*, 403 U.S. 602, 91 S. Ct. 2105.

The existence of this valid secular purpose is reflected in at least four different documents. The letter initially requesting the investigation dated June 3, 1991 from Councilman Zev Yaroslavsky to the Board of Police Commissioners stated:

> [Q]uestions have arisen recently about whether the views of Assistant Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department . . . Chief Vernon is, of course, entitled to his personal religious and political views . . . However, when one' [sic] views interfere with one's ability to perform official duties fairly and without bias, it is . . . a matter of public policy.

The memorandum ordering the investigation, dated June 5, 1991, from Acting Police Commissioner Melanie Lomax to the Chief of Police, directed in the first paragraph "that an investigation be conducted into certain issues raised by Councilman Yaroslavsky concerning the *on-duty activities* of Assistant Chief Robert L. Vernon." The memorandum went on to state:

> The Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures. It is toward this end that a thorough investigation is requested.

The Police Commission record from a meeting of the Board of Police Commissioners held on June 4, 1991, reflects that Commissioner Sheinbaum stated with respect to the investigation that:

> The Police Commission will refer this matter to the Chief of Police with the request that the allegations be investigated with the specific purpose of determining whether or not Assistant Chief Vernon has engaged in any conduct that violates LAPD policies or procedures, or

> engaged in any conduct that has adversely impacted the Department.

Finally, in a Declaration submitted to this Court by Chief of Police Gates, who conducted the investigation, Chief Gates stated:

> The inquiry was limited to the *on-duty activities* of Chief Vernon . . . Just as LAPD policy prohibits the establishment or use of religious biases and preferences in the operation of the LAPD, it is also LAPD policy not to infringe on the free expression and religious rights of LAPD personnel.

In light of these four documents, three of which were produced prior to the commencement of the investigation, it is apparent that inquiring into allegations of wrongdoing on Plaintiff's part was a genuine secular purpose of the investigation, and not merely a sham or an after-the-fact justification by Defendants. *See Wallace*, 472 U.S. at 75, 105 S. Ct. at 2500 (O'Connor, J., concurring). Moreover, Plaintiff has offered no evidence whatsoever showing that the determination of whether Plaintiff violated any civil rights, constitutional rights, or departmental policies or procedures was not *a* purpose of the investigation of Plaintiff. At best, Plaintiff has presented evidence going to whether the investigation had invalid religious purposes in addition to its secular one; and to whether the investigation had the *effect* of violating Plaintiff's constitutional rights (which is an aspect of the second, not the first, *Lemon* prong).

In sum, there is abundant evidence that the investigation of Plaintiff had the valid secular purpose of determining whether Plaintiff had violated any civil rights,

constitutional rights, or departmental policies or procedures, and an absence of evidence suggesting otherwise. Accordingly, there is no genuine issue of material fact with respect to whether the investigation meets the first prong of the Lemon test, and Defendants are thus entitled to summary judgment on this issue as a matter of law.

(b) The Pre-investigation

There is no evidence in the record suggesting that the genuine purpose of the Yaroslavsky Letter, the Lomax Letter, and the Board Motion was anything other than to put into motion the investigation. As for the May 25 Sheinbaum Public Statement and the June 4 Sheinbaum and Lomax Public Statement, they had an equally self-evident secular purpose: to keep the public abreast of the decision to launch the investigation, and in particular, to inform the public of the secular purpose served by the investigation. As such, there is no genuine issue of material fact with respect to whether the pre-investigation meets the first prong of the Lemon test, and Defendants are entitled to summary judgment on this issue as a matter of law.

2. The Primary Effect Prong[8]

(a) The Investigation

It is clearly established that any governmental action whose effect is to send a message of disapproval of a particular religion "inhibits religion," and thus violates the second prong of the *Lemon* test. *See Roberts v. Madigan*, 921 F. 2d at 1054 (observing that "the Supreme Court has repeatedly stated that the effect prong is not satisfied if official action, regardless of its purpose, "conveys a message of . . . disapproval" of religion); *see also Allegheny v. A.C.L.U.*, 492 U.S. 573, 593, 109 S. Ct. 3086, 3105 (1989); *Wallace*, 472 U.S. at 56 n.42, 105 S. Ct. at 2489 n.42; *Lynch*, 465 U.S. at 690, 104 S. Ct. at 1368; *Cammack*, 932 F. 2d at 778 (O'Scannlain, J., concurring).

Significantly, while the inquiry of the second prong of *Lemon* invariably implicates facts, it is ultimately a question of law which the court must decide. *See Lynch*, 465 U.S. at 694, 104 S. Ct. at 1370 (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact [but is] . . . in large part a *legal* question to be answered on the basis of *judicial* interpretation of social facts" (emphasis added)); *Wallace*, 472 U.S. at 75, 105 S. Ct. at 2500 (O'Connor, J., concurring); *cf. Bose Corp. v.*

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[8] *See Lynch*, 465 U.S. at 460, 104 S. Ct. at 1368 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveyed a message of endorsement or disapproval. . . . ").

Consumers Union, 466 U.S. 485, 508, 104 S. Ct. 1949, 1964 (1984) (holding that the clearly erroneous standard did not govern appellate review of a finding of malice by the factfinder under a First Amendment standard).

Moreover, the correct inquiry of the second *Lemon* prong is an *objective* one: namely, whether it would be objectively reasonable for the government action to be construed as sending primarily a message of disapproval. *See Wallace*, 472 U.S. at 75, 105 S. Ct. at 2500 (O'Connor, J. concurring); *Commack*, 932 F. 2d at 782 n.19; *Friedman v. Board of County Comm'rs*, 781 F. 2d 777, 780-81 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S. Ct. 2890 (1986); *Foremaster v. City of St. George*, 655 F. Supp. 844 (D. Utah 1987). The Court finds that it is not objectively reasonable to construe the investigation as having had the primary effect of conveying to the community a message of disapproval of Fundamentalism. There is simply no evidence in the record suggesting that the investigation could convey such a message as a secondary, or incidental effect, let alone as a primary effect. Nothing about the investigation as it is described in Chief Gates' *uncontroverted* declaration gives the impression that Defendants disapproved of Fundamentalism. Indeed, Plaintiff conceded as much in oral argument on March 9, 1992, when he stated that nothing about the investigation itself deprived Plaintiff of his First Amendment rights.

(b) The Pre-investigation

The Court finds for a variety of reasons that it would not be reasonable to construe the pre-investigation as

having had the *primary* effect of conveying to the community a message of disapproval of Fundamentalism either. First, the Yaroslavsky Statement, the June 4 Sheinbaum and Lomax Public Statements, and the Lomax Letter all contain language that would clearly establish to the objective observer that these Defendants were respectful, and not disapproving, of Christian Fundamentalism. In the Yaroslavsky Letter, Yaroslavsky stated, "[Plaintiff] is, of course, entitled to his personal religious and political views. I vigorously defend his right to his views." In the June 4 Sheinbaum and Lomax Statements, Sheinbaum specified that, "[t]he views of the Assistant Chief are his own. He has every right to them." Finally, the Lomax Letter stated, "It should be clear from the outset that it is not the intention of this Board to abridge the First Amendment rights of Chief Vernon or anyone else, as each member of this Commission would vigorously protect and defend those rights." In view of the undisputed facts and circumstances involved, it is objectively reasonable to take Defendants to have meant what they said, and there is no reasonable basis for concluding that Defendants had ulterior motives for what they said.[9]

Second, a reasonable person would agree with Yaroslavsky that, "when one's views interfere with one's ability to perform official duties fairly and without bias, it is no longer a personal matter, but a matter of public policy;" with Sheinbaum that it is a matter of some concern

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[9] Nothing in the other two components of the pre-investigation, the May 25 Sheinbaum Public Statement, and the Board Motion, contradicts or overcomes the respectful message contained in these three components.

that an Assistant Police Chief's religious views have "impacted on his role as Assistant Police Chief," and with Lomax that an Assistant Police Chief has, among other things, "violated any Department policies or procedures." But if a reasonable person would endorse Defendants' statements, it follows that the same person would not ascribe a message of disapproval of Christian Fundamentalism to those statements.

It would also be unreasonable to infer a message of disapproval of Christian Fundamentalism from the pre-investigation because nothing in the pre-investigation suggested that Defendants would have treated allegations of wrongdoing on the part of any high-level official who has Hindu, Muslim, Catholic, or Jewish any differently. Instead, it would be reasonable to infer that any high-level official of a religious persuasion other than Fundamentalism would have been treated *similarly* from the highly generalized terms in which Defendant Yaroslavsky couched his reason for requesting an investigation: "[W]hen *one's* views interfere with *one's* ability to perform *official duties* fairly and without bias, it is no longer a personal matter, but a matter of public policy" (emphasis added).

In light of the above, the Court finds that as a matter of law, the pre-investigation did not violate the effect prong of the *Lemon* test any more than the investigation did.

3. The Excessive Entanglement Prong

In the Court's view, the "entanglement with religion" prong of the *Lemon* test is simply inapposite to the facts of this case. In order to determine whether challenged government involvement constituted excessive government entanglement with religion, a court must "examine the character and purpose of the institutions that are [affected], the nature of the aid [if any] that the [government action] provides, and the resulting *relationship* between the government and *religious authority*." *Lemon*, 403 U.S. at 615, 91 S. Ct. at 2112 (emphasis added). Quite simply, there is no evidence – and Plaintiff nowhere even alleges – that the investigation of Plaintiff involved the establishment of a "relationship" between Defendants and the Fundamentalist Church of which Plaintiff was a member. Indeed, if Plaintiff's contention that the investigation's primary effect was to disfavor Fundamentalism is correct, such disfavor appears to constitute the opposite of government "entanglement" with the Fundamentalist Church – namely, government distancing itself from and repudiating that Church. *See Bishop*, 926 F. 2d at 1077.

Therefore, the Court finds that neither the investigation nor the pre-investigation violated the excessive entanglement prong of the *Lemon* test.

D. Conclusion

The Court has found that there is abundant evidence in the record suggesting that both the investigation and the pre-investigation had at least one genuine secular purpose, and insubstantial or no evidence in the record

suggesting otherwise. The Court has also found that as a matter of law, the investigation and the pre-investigation pass the effect prong of the *Lemon* test. Finally, the Court has found no evidence in the record suggesting that the investigation or the pre-investigation involved excessive entanglement between government and the Christian Fundamentalist Church. In sum, there is no triable issue of material fact as to whether the investigation and the pre-investigation pass all three prongs of the *Lemon* test. As such, the Court concludes that the investigation and the pre-investigation did not violate the Establishment Clause of the First Amendment, and Defendants' motion with respect to the Establishment Clause is GRANTED as to all Defendants.

VII. COMPELLING GOVERNMENT INTEREST ANALYSIS AND THE ESTABLISHMENT CLAUSE

So far, the Court has determined that there is no triable issue of material fact as to whether the investigation, or the events leading up to the investigation, failed the *Lemon* test and hence violated the Establishment Clause. Even if the investigation or the pre-investigation were found to run afoul of the *Lemon* test, however, Plaintiff would still be foreclosed from prevailing on his Establishment Clause claim.

Establishment Clause analysis does not necessarily end with the *Lemon* test. Even if government action has no genuine secular purpose, has the primary effect of inhibiting religion, or involves excessive entanglement of

government with religion, the action is nevertheless constitutional if it is both (1) justified by a compelling government interest and (2) narrowly tailored to further that interest. *See, e.g., Scott v. Rosenberg*, 702 F. 2d 1263, 1274 (9th Cir. 1983), *cert. denied* 465 U.S. 1078, 104 S. Ct. 1439 (1984)

In the past, this two-part compelling government interest analysis has been applied only to Free Exercise Claims, and not Establishment Clause claims. As one commentator noted several years ago:

> [N]otions of compelling justification have been employed only in free exercise cases; government actions have been deemed either violative of the anti-establishment principle or not – the balancing process in that setting has been incorporated into the definitions of the terms themselves.

Lawrence H. Tribe, *American Constitutional Law* 1251 n.1 (2nd ed. 1988).

In recent years, however, the law has done an about-face: compelling government interest analysis has been ousted from the Free Exercise area, *see Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), and assumed a firm place in the Establishment Clause area. In late 1987, Judge, now Justice Kennedy, writing for the Ninth Circuit, held that a tax rule that arguably had the effect of treating the Church of Scientology more harshly than other religious institutions, was nevertheless *not* in violation of the Establishment Clause "for the reason that the government ha[d] a sufficient and compelling justification for its rule." *Graham*, 822 F. 2d at 853. Since *Graham*, at least five other courts have seen fit to adopt

compelling government interest analysis in Establishment Clause cases, including the Third Circuit Court of Appeals less than three weeks ago. *Brody v. Spang*, No. 91-1209, 1992 U.S. App. LEXIS 2731, at 38 (3rd Cir. Feb. 28, 1992) (stating that "should the district court find that school officials do have a compelling interest under the establishment clause, the district court must then consider whether [the government action] ha[s] been narrowly tailored to further this interest."). *See also Rupert v. Director, U.S. Fish and Wildlife Serv.*, No. 91-1861, 1992 U.S. App. LEXIS 2208 at 6 (1st Cir. February 19, 1992); *Smith v. County of Albemarle, VA*, 895 F. 2d 953 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 74 (1990); *Olsen v. Drug Enforcement Admin.*, 878 F. 2d 1458, 1468-69 (D.D.C. 1989), *cert. denied*, 110 S. Ct. 1926 (1990), *citing Larson v. Valente*, 102 S. Ct. 1673 (1982) (Brennan, J.); *Jewish War Veterans of the United States of America v. United States*, 695 F. Supp. 3 (D.D.C. 1988); *cf. Lynch*, 465 U.S. at 689 n.1, 104 S. Ct. at 1367 n.1 (O'Connor, J., concurring) ("[T]he Court has held that a statute or practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive [an Establishment Clause challenge]. . . . " (*citing Larson*, 456 U.S. 228, 102 S. Ct. 1673 (1982))).

In light of this recent trend, the Court deems it appropriate to employ compelling government interest analysis with respect to Plaintiff's Establishment Clause claim. Under that analysis, even if the investigation and the pre-investigation failed the *Lemon* test, they would nevertheless be constitutionally permissible if: (1) Defendants had compelling government interests in them, and (2) their scopes were sufficiently closely tailored to those

government interests. The Court will conduct both of these inquiries below, first with respect to the investigation, then with respect to the pre-investigation.

A. The Investigation

1. Whether there was a Compelling Government Interest Served by the Investigation

Whether there is a compelling government interest served by challenged government action is a question of *law. Rosenberg*, 702 F. 2d at 1274. In its analysis of the first prong of the *Lemon* test, the court found that the determination of whether Plaintiff was violating the civil and constitutional rights – including Establishment Clause rights – of others, and whether Plaintiff was violating departmental policies or procedures, was a genuine secular purpose of the investigation. The Court now similarly finds that seeking to protect civil and religious liberties, ensure compliance with police department policies and procedures, and above all, avoid the appearance of the establishment by the government of Christian Fundamentalism, serves a compelling government interest.

It appears that Plaintiff would not take issue with the latter finding. In his papers seeking a preliminary injunction, Plaintiff stated:

> The plaintiff fully acknowledges the lawful power of his employer to investigate any acts or omissions on his part which may be deemed to have violated the law.

Pl.'s Mot. Prelim. Inj. Order at 12.

Moreover, at deposition, Plaintiff was asked whether he agreed "that an allegation that the. . . . Assistant Chief of Operations is using religious preferences in promotion of police officers, high ranking police officers, is a serious allegation." Plaintiff answered, "I would consider it serious." (Miller Suppl. Decl. Ex. B.)

In any event, nowhere in his papers does Plaintiff allege that inquiring into whether a Deputy Chief of Police is violating the rights of others is *not* a compelling government interest. Instead, Plaintiff found fault with the investigation primarily because "the mandate to investigate . . . [was] not limited to an investigation . . . [into] whether he . . . violated any statute, ordinance or regulation . . . [but was] directed to the plaintiff's 'personal religious beliefs' and religious associations." Pl.'s Mot. Prelim. Inj. Order at 13. This allegation, however, relates not to whether the valid secular purpose served by the investigation involved a compelling government interest, but rather to the propriety of the *scope* of the *pre*-investigation

Plaintiff raised one further argument. He contended that there could have been no compelling government interest in conducting the investigation because there were inadequate grounds for launching the investigation in the first place. In other words, Plaintiff argued in effect that there can be no compelling government interest in investigating baseless charges, regardless of whether such charges, *if* true, would constitute constitutional violations.

Plaintiff's point is not well taken. It may well be that in hindsight, it can be said that there was no basis to the

allegations made against Plaintiff. It may also well be that Plaintiff believed all along that there was no basis to the allegations. None of this precludes the compelling government need for the investigation, however. The legitimate secular objective of the investigation was precisely to determine whether there was any basis to the numerous allegations concerning plaintiff made by many different people. As such, that it might *now* be known that the allegations made were in fact untrue does not indicate that the investigation need never have been launched; to the contrary, it indicates that the valid secular purpose of the investigation was achieved, and that the investigation was brought to a *successful* conclusion.

The Court concludes that where so many allegations are made by a host of different people concerning so vital and urgent an issue as the possible violation of civil and constitutional rights by an Assistant Chief of Police, there is a compelling government interest in launching an inquiry to determine whether the allegations can be substantiated, even if some of the allegations are not well substantiated prior to the investigation. Accordingly, as a matter of law, Defendants had a compelling government interest in launching the investigation.

2. Whether the Investigation was Closely Fitted, or Narrowly Tailored, to the Compelling Government Interest Served by the Investigation

Whether a government action is closely fitted, or narrowly tailored, to the compelling government interest involved is a question of *fact*. *See Buddie v. City of Elyria,*

773 F. Supp. 1018 (E.D. Ohio 1991); *Detroit Police Officer Assoc. v. Coleman*, 765 F. Supp. 393 (E.D. Mich. 1991); *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654 (D.C. Minn. 1990), *aff'd in part and rev'd in part*, 948 F. 2d 464 (8th Cir. 1991) (*rev'd on other grounds*); *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F. Supp. 923 (N.D. Ill. 1990); *International Society For Krishna Consciousness, Inc., v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989), *aff'd in part and rev'd in part*, 925 F. 2d 576 (2nd Cir. 1991) (*rev'd on other grounds*).

There is simply no evidence in the record showing that the investigation as it was actually carried out by Chief Gates exceeded its constitutionally permissible scope. Indeed, at a hearing held on March 9, 1992, Plaintiff not only admitted there was no such evidence in the record, but indicated to the Court that Plaintiff did not even *allege* that the investigation's scope was overly-broad. In light of this, the Court concludes that there is no triable issue of fact with respect to whether the investigation narrowly fit Defendants' interest in investigating Plaintiff's alleged on-duty wrongdoing, and that Defendants are therefore entitled to summary judgment on this issue as a matter of law.

B. The Pre-investigation

1. Whether there was a Compelling Government Interest Served by the Pre-investigation

Insofar as the Yaroslavsky Letter, the Lomax Letter, and the Board Motion put into motion the investigation,

they served, indirectly, the same compelling government interest served by the investigation itself. The Court also finds that the May 25 Sheinbaum Public Statement, and the June 4 Sheinbaum and Lomax Public Statements served the compelling government interest in keeping the public abreast of an investigation into one of the City's highest-level officials and, in particular, in informing the public of the purpose of that investigation.

2. Whether the Pre-investigation was Closely Fitted, or Narrowly Tailored, to the Compelling Government Interest Served by the Pre-investigation

The individual components of the pre-investigation were on their face explicitly fitted by Defendants to the underlying government interest being served. In the Lomax Letter, Lomax specified that:

> It should be clear from the outset that *it is not the intention of this Board to abridge the First Amendment rights of Chief Vernon or anyone else,* as each member of this Commission would vigorously protect and defend those rights. The Board wishes *only* to insure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters . . . .

(emphasis added)

Defendants Yaroslavsky and Sheinbaum similarly fitted their statements to the compelling government interest underlying them by stressing that Plaintiff was "entitled to his personal religious and political views," and that Plaintiff had "every right" to his views.

In light of this clear evidence that Defendants in the pre-investigation sought to and succeeded in fitting the pre-investigation to the underlying compelling government interest being served, and the total absence of evidence in the record to the contrary, the Court concludes there is no triable issue of fact with respect to this question. Therefore, Defendants are entitled to summary judgment on this issue as a matter of law.

VIII. QUALIFIED IMMUNITY AND PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM

Thus far, the Court has determined that: (1) there is no triable issue of material fact with respect to whether the investigation or the pre-investigation violated the *Lemon* test, and (2) even were the pre-investigation or the investigation to have run afoul of the *Lemon* test, Plaintiff would still be foreclosed from prevailing on his Establishment Clause claim by compelling government interest analysis. Apart from these insurmountable obstacles to Plaintiff's claims, however, there are additional grounds for barring Plaintiff from obtaining relief from all individual Defendants.

Government officials who perform discretionary functions are generally given qualified immunity from civil damage suits so long as the conduct of the officials does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982); *Schwartzman v. Valenzuala*, 846 F. 2d 1209, 1211 (9th Cir. 1988).

In determining whether the law was clearly established, the contours of the right alleged to have been violated must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3039 (1987); *cf. Colaizzi v. Walker*, 812 F. 2d 304, 308 (7th Cir. 1987) ("Our conclusion is that the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted. . . . "). This requires more than an alleged violation of extremely abstract rights. The action in question, however, need not be previously held unlawful. *Brady v. Gebbie*, 859 F. 2d 1543, 1556 (9th Cir. 1988), *cert. denied*, 489 U.S. 1099, 109 S. Ct. 1577 (1989). Rather, the unlawfulness must be apparent in light of preexisting law.

Whether at the time of the challenged action the legal norm allegedly violated by an official was clearly established is a question of *law*, *Mitchell v. Forsyth*, 472 U.S. 511 n.9, 105 S. Ct. 2806, 2816 n.9 (1985), whereas whether a reasonable official would know that he or she is violating that clearly established law is a question of *fact*. *Schlegel v. Bebout*, 841 F. 2d 937, 945 (9th Cir. 1988).

In the present case, the only applicable clearly established law is the Establishment Clause, together with the *Lemon* test, and compelling government interest analysis as it is broadly stated in the case law cited above. The Court finds that in the absence of more specific clearly established law, and owing to the uniqueness of the circumstances of this case, no jury could reasonably conclude that Defendants Lomax and Sheinbaum should

have known that the investigation or their actions bringing about the investigation were unlawful. Conversely, no jury could reasonably find that Defendants Lomax and Sheinbaum could not have reasonably believed that their actions were lawful.

In the course of briefing the three motions filed in this case, Plaintiff failed to identify a single case in which an investigation of the kind conducted by Defendants was found to violate the Establishment Clause, in which the lead-up to an investigation of any kind was found to violate the Establishment Clause, or in which a court defined with precision the contours of investigatory activity permitted by the Establishment Clause. Although this absence of precedent is not, by itself, fatal to all of Plaintiff's arguments, it is nevertheless dispositive of the question of qualified immunity. No reasonable jury could possibly find that any of the individual Defendants were on notice that either the pre-investigation or the investigation was unlawful, because there was simply no sufficiently apposite law to put them on notice. *See, e.g., Anderson*, 483 U.S. at 638, 107 S. Ct. at 3039. Consequently, even were the pre-investigation or the investigation found to have violated Plaintiff's Establishment Clause rights, the individual Defendants would be shielded by qualified immunity as a matter of law, and Plaintiff would be barred from pursuing his claim for *damages* against them. *See The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (stating that "[q]ualified immunity is an affirmative defense to

damage liability; it does not bar actions for declaratory or injunctive relief.").[10]

IX. Due Process

Plaintiff's Due Process claim is foreclosed by the Court's ruling on Plaintiff's Free Exercise and Establishment Clause claims. Inasmuch as the Fourteenth Amendment of the U.S. Constitution reads, "No State shall . . . deprive any person of life, liberty, or property, without due process of law," a plaintiff can recover under the Fourteenth Amendment for failure to receive due process only when he has been deprived of an interest involving life, liberty, or property. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705 (1972). A deprivation of a religious freedom guaranteed by the First Amendment can constitute an interest involving "life, liberty or property." *See, e.g., Williams v. Lane*, 851 F. 2d 867, 879-80 (7th Cir. 1988). However, the Court has ruled that Plaintiff has suffered no deprivation of any such freedom on account of the pre-investigation or the investigation.[11] Thus, insofar as Plaintiff has not alleged any other deprivation rising to the level of an interest involving life, liberty, or property, Defendants are entitled

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[10] Compare legislative immunity, discussed *supra* Part III, and judicial immunity, which bars injunctive relief in *Bivens* actions, *Mullis v. Bankruptcy Court, Dist. of Nevada*, 828 F.2d 1385 (9th Cir. 1987), but permits it in § 1983 actions. *Lebbos v. Judges of Super. Ct. Santa Clara County*, 883 F. 2d 810 (9th Cir. 1989).

[11] The Court has not found that either the pre-investigation or the investigation even threatened to deprive Plaintiff of his First Amendment religious rights.

to summary judgement with respect to Plaintiff's Due Process claim as matter of law.[12]

X. Equal Protection

Plaintiff's Equal Protection claim cannot survive this motion for summary judgment any more than his Due Process claim, for like his Due Process claim, Plaintiff's Equal Protection claim suffers from a simple, but fatal defect. It is well established that in order to prevail on an Equal Protection claim, a plaintiff carries the burden of proving, as a threshold matter, that similarly situated people were treated differently. *See City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S. Ct. 3249,

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[12] The Court notes that the possibility of damage to Plaintiff's reputation would not have been enough, without more, to require any process during the pre-investigation or the investigation, and hence to now warrant monetary or injunctive relief for a failure to provide any process. *Kirk v. Hesselroth,* 707 F. Supp. 1149, 1152 (N.D. Cal. 1988), *aff'd,* 914 F.2d 262 (9th Cir. 1990); *see also Paul v. Davis,* 424 U.S. 693, 701, 96 S. Ct. 1155, 1164 (1976). A plaintiff must have been deprived of some additional, more tangible life, property, or liberty interest, such as an employment interest, in order to recover for damaged reputation under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Barberic v. City of Hawthorne,* 669 F. Supp. 985 (C.D. Cal. 1987) (stigmatization of police woman, coupled with the termination of her employment, constituted adequate grounds for recovering under Due Process Clause); *see also Vanelli v. Reynolds School Dist. No. 7,* 667 F.2d 773, 777 (9th Cir. 1982).

Plaintiff here, of course, cannot argue like the plaintiffs in *Kirk* and *Barberic* that he was deprived of an employment interest, because Plaintiff was neither terminated, suspended, or disciplined, but rather was the object of an investigation that prompted no "alteration of [a] right or status recognized by state law." *Kirk,* 707 F.2d at 1152.

3254 (1985); *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982); *Hoffman v. United States*, 767 F. 2d 1431, 1436, (9th Cir. 1985); *Brady v. Town of Colchester*, 863 F. 2d 205, 216 (2nd Cir. 1988) (to prevail on an Equal Protection claim, plaintiff must present evidence that the government singled him out for disparate treatment); *Mahone v. Addicks Utility Dist. of Harris County*, 836 F. 2d 921, 932 (5th Cir. 1988) (where challenged government action does not appear to classify between two or more relevant persons or groups, action does not violate Equal Protection); *Brennan v. Stewart*, 834 F. 2d 1248, 1257 (5th Cir. 1988) (a violation of Equal Protection only occurs where the government treats similarly situated people differently); 732 F. Supp. 1046, 1055 (C.D. Cal. 1990).

Plaintiff has failed to present any evidence whatsoever of disparate treatment of any class of similarly situated people. Plaintiff has failed even to show that a class of similarly situated people exists. Without any showing of these essential elements, no triable issue of fact exists, and Plaintiff's Equal Protection claim must fail in the face of this summary judgment motion. *Spence v. Zimmerman*, 873 F. 2d 246, 261-62 (11th Cir. 1989) (no showing of similarly situated people who were treated differently; summary judgment affirmed); *Church of Jesus Christ of Latter-Day Saints v. Jefferson County, Ala.*, 721 F. Supp. 1212, 1216-17 (N.D. Ala. 1989) (plaintiffs offered no proof of similarly situated people who were treated differently; summary judgment granted as to Equal Protection claim); *Hammond v. Auburn University*, 669 F. Supp. 1555, 1563 (M.D. Ala. 1987) (summary judgment granted where there was no evidence that any similarly situated people were treated differently); *see also Mlikotin v. City of*

Los Angeles, 643 F. 2d 652, 654 (9th Cir. 1981); *Samaad v. City of Dallas*, 940 F. 2d 925, 941 n.31 (5th Cir. 1991); *Yale Auto Parts, Inc. v. Johnson*, 758 F. 2d 54, 61 (2nd Cir. 1985). Accordingly, the Court concludes that Defendants are entitled to summary judgment with respect to Plaintiff's Equal Protection claim as a matter of law.

XI. Conclusion

For all of the above reasons, the Court GRANTS Defendants' Motion for Summary Judgment in its entirety.

IT IS SO ORDERED.

DATED: April 8, 1992

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

City Council
of the
City of Los Angeles
City Hall
90012

[Names and Addresses Omitted in Printing]

June 3, 1991

Ms. Melanie Lomax, Acting President
Board of Police Commissioners
150 No. Los Angeles Street
Los Angeles, California 90012

Dear Ms. Lomax:

As you are aware, questions have arisen recently about whether the views of Assistant Police Chief Robert L. Vernon may be improperly shaping the operations and policies of the Los Angeles Police Department. During his confirmation hearing Commissioner Yamaki indicated a willingness to conduct an investigation of this matter. I am writing today to confirm my interest in such a review.

Chief Vernon is, of course, entitled to his personal religious and political views. I vigorously defend his right to his views. However, when one's views interfere with one's ability to perform official duties fairly and without bias, it is no longer a personal matter, but a matter of public policy.

Allegations concerning promotion, hiring and treatment of gays and lesbians, and, most recently, the consultation of religious elders on issues of police policy, deserve to be reviewed. If the allegations have merit, then they should

be addressed and the problems corrected. If they are without merit, then they should be laid to rest at once. It is critical that this issue be dealt with thoroughly and expeditiously.

Thank you in advance for your attention to this matter.

Sincerely,

/s/ Zev Yaroslavsky
Zev Yaroslavsky
Councilman, Fifth District

ZY:akj

APPENDIX D

INTRADEPARTMENTAL CORRESPONDENCE

June 5, 1991
P.C. No. 6/1

TO: Chief of Police

FROM: Acting President, Board of Police Commissioners

SUBJECT: REQUEST FOR INVESTIGATION

The Board of Police Commissioners requests that an investigation be conducted into certain issues raised by Councilman Yaroslavsky concerning the on-duty activities of Assistant Chief Robert L. Vernon.

The investigation should include a determination in the areas of the promotions, hiring and treatment of gays, lesbians and women, and the consultation of religious elders on issues of police policy.

It is specifically requested that findings be made as to whether Chief Vernon has sent official communications from this office which contain or have displayed religious symbols. It is also specifically requested that a determination be made as to whether employees who have been promoted by Chief Vernon have received preferential treatment through their affiliations with his church. This determination is to include both sworn and civilian personnel.

It should be clear from the outset that it is not the intention of this Board to abridge the First Amendment rights of Chief Vernon or anyone else, as each member of this Commission would vigorously protect and defend

those rights. The Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures. It is toward this end that a thorough investigation is requested.

It is requested that a progress report be presented in Closed Session on June 25, 1991, and that the final report be completed as early in July, 1991, as possible.

Your cooperation in this matter is greatly appreciated.

/s/ Melanie E. Lomax
MELANIE E. LOMAX, Vice-President
Board of Police Commissioners

cc: Commissioners Williams, Sheinbaum and Yamaki